

Chapter 2

The System of Criminal Investigation in the Netherlands

2.1 Introduction

2.1.1 Goals of the Chapter

The assessment of the manner in which anticipative criminal investigation has been embedded in the Dutch system of criminal procedural law and, possibly, cognate legal systems, will require a precise understanding of the system of criminal investigation in the Netherlands. The goal of the underlying chapter is to provide for this precise understanding by drawing the relevant legal background of the system of criminal investigation and to identify the basic assumptions underpinning the regulation of criminal investigation in the Netherlands. Changes to the system that have been adopted in order to make the criminal investigation also suitable for the prevention of terrorism, thereby enabling anticipative criminal investigation, will not yet be dealt with. These changes will be addressed in [Chap. 3](#). The description of the system of criminal investigation in the current chapter will be provided in a serving manner: in anticipation of the changes adopted for terrorism prevention and the implications of these changes for the system of criminal procedural law as the synthesis of the sword and shield elements. Therefore, some aspects which are relevant for understanding the consequences of changes to the system in response to the terrorist attack of September 11th 2001 and the attacks on European soil in Madrid and London in March 2004 and July 2005 will be dealt with in more detail. Other aspects will be addressed more generally and only to provide a correct understanding of the system as a whole. Specific attention will also be attributed to the basic principles and assumptions underpinning the regulation of the Dutch system of criminal investigations, notwithstanding the fact that some of these principles have a regulatory influence on the system as a whole. Addressing these principles is in particular important in order to be able to draw conclusions as to the

implications of the changes (as described in [Chap. 3](#)) to the sword and shield objectives of criminal procedural law, which will be done in [Chap. 4](#).

The rights and principles underpinning the Dutch system of criminal investigation follow in the first place from the European Convention on Human Rights, which is directly applicable in the Netherlands. Because the Netherlands does not have a Constitutional Court, the decisions of the European Court of Human Rights have a significant regulatory influence.¹ In addition, Constitutional rights and fundamental principles of criminal procedural law constitute the foundation of the framework for regulating criminal investigation. After providing for some basic characteristics of the Dutch criminal justice system, this introductory section will elaborate on these fundamental principles and rights that are relevant for the regulation of criminal investigations in the Netherlands. Furthermore, the contents of this chapter will largely follow from the manner in which the criminal investigation has found its regulation in the Dutch Code of Criminal Procedure (henceforth: CCP), originally adopted in 1926, which provides for the basic choices for giving effect to the sword objective and shield objective in criminal investigation. On the basis of the provisions of the CCP the specific role and functions attributed to the different actors in the criminal investigation and the adopted restrictive elements on the use of criminal investigative powers can be identified. In order to provide for a correct understanding of these provisions, their interpretation in case law, in so far as is applicable, will be taken into account.

The chapter is divided into two main parts, reflecting the synthesis that the regulation as a whole shall provide between the sword and shield objectives. [Section 2.2](#) will deal with the manner in which the system of criminal investigation is able to give effect to the sword objective of criminal procedural law. The actors responsible for carrying out the sword function of criminal investigation and the criminal investigative powers attributed to these actors will be described. Attention will also be given to the relevance of the activities of the intelligence and security service for the criminal investigation. Subsequently, [Sect. 2.3](#) will address the shield responsibilities of the actors having a role in the criminal investigation and describe the restraints on the powers of criminal investigation in order to give effect to the principles and rights underpinning the shield objective of criminal investigation.

Hence, this chapter will seek an answer to the following two questions:

1. How is the sword objective in the Dutch system of criminal investigation realized? This will firstly require an analysis of the actors that have a truth-finding responsibility and, secondly, an analysis of the investigative powers available to these truth-finding actors.
2. How is the shield objective in the Dutch system of criminal investigation realized? Answering this question will, firstly, require an analysis of the responsibility of the actors during the criminal investigation to contribute to the fairness of the investigation. Furthermore, different elements have been adopted in order to provide for legal protection against arbitrary interferences with the fundamental right to respect for private life and in order to realize a fair criminal process.

¹ See in more detail the introduction to [Sect. 2.1.3](#).

2.1.2 *The Dutch Criminal Justice System*

Contiguous to the objectives of criminal procedural law, as formulated in [Chap. 1](#), the Dutch CCP as established in 1926 clearly formulates that the main goal of criminal procedural law is to establish the truth in order to convict the guilty and to prevent the conviction of those who are innocent.² Considering this goal of criminal procedural law, the criminal process must be designed in a manner that is orientated towards truth-finding, while the possibility that the innocent will be convicted is minimized. More specifically, the criminal process must provide for enough safeguards to prevent criminal procedural powers having an adverse impact on the innocent (the shield function of criminal procedural law) and, at the other hand, provide for enough practical means to enable truth-finding by the police and the Public Prosecution Service (henceforth: PPS), the judiciary (pre-trial: the examining magistrate, and, subsequently, the trial judge) and the defense (the sword function of criminal procedural law). The combination of both functions shall result in a system that can, with sufficient certainty, produce the substantive truth.³ In addition, criminal procedural law shall be attributed a broader and independent shield function: not only guaranteeing the just application of the criminal law, but also generally providing the safeguards against the arbitrary and unnecessary use of criminal procedural powers.⁴

Currently the role of criminal procedural law and, thus, of the CCP, is understood as pursuing the interests of *all* involved—victims as well as suspects—and providing space for a criminal justice system in which fundamental rights and the interests of the accused, witnesses and victims are recognized.⁵ The desire to pursue both of these objectives of criminal law and to design a system of criminal justice, accordingly, has resulted in specific choices that have become basic assumptions for criminal procedural law in the Netherlands. These basic assumptions are directly related to the legal tradition of the Netherlands. Hence, this section will start by describing the legal tradition of the Netherlands, followed

² This view was also adopted by the research into Criminal Procedure in 2001 (an extensive research project into the fundamentals of criminal procedural law as a proposal for a possible new Code of Criminal Procedure): Groenhuijsen and Knigge 2001.

³ Groenhuijsen and Knigge 2001, 17-18.

⁴ Brants et al. 2003, 2-6. The authors consider the Criminal Procedure 2001 researchers' view on the objectives of criminal procedural law to be too restrictive: the shield function of criminal procedural law has been reduced to *a* function, instead of *the* (main) function of criminal procedural law. In this book the approach has been taken that criminal procedural law has two main objectives: a shield and a sword objective (see [Chap. 1, Sect. 1.2.4](#)). The shield objective will, however, be described more broadly than only making sure that the innocent are not convicted. It has a general protective function against the arbitrary and unnecessary use of criminal procedural powers, which is connected to the *ultimum remedium* character of criminal procedural law.

⁵ Groenhuijsen and Simmelink 2008, 379.

by an explanation of the basic assumptions in the system of Dutch criminal investigation that follow from the Dutch legal tradition.

Dutch criminal procedural law is strongly influenced by the French system. The French *Code d'Instruction Criminelle* that entered into force in 1811 also applied, by order of Napoleon, in the Netherlands. This Code strongly followed an inquisitorial model, especially in the pre-trial phase. The Netherlands first adopted its own Code of Criminal Procedure in 1838, which was however basically a copy of the French *Code d'Instruction Criminelle*, although trial by jury had been abolished. In 1926 the current Code of Criminal Procedure replaced the old version. The CCP importantly changed the character of the criminal investigation by regulating the powers of the police and the Public Prosecution Service, providing citizens with legal protection against state power and allowing procedural rights for the suspect (pre-trial) and the accused (after the decision to prosecute has been taken). The reforms aimed to turn the inquisitorial character of the criminal justice system into a more accusatorial process. The explanatory memorandum to the Dutch CCP characterizes the criminal justice system as being moderately accusatorial. In fact, it is neither typically inquisitorial nor accusatorial, but has features of both. The design of the criminal justice system has been based on the compromise between, on the one hand, the need to give the state the powers to repress crime and to protect the victim, and, on the other hand, to provide the defense with all rights that do not obstruct the purpose of the system; the establishment of the substantive truth.⁶ The Dutch criminal justice system has evolved from being inquisitorial, with the focus on crime control, towards a system in which also the protective elements of the rule of law are recognized by including safeguards that aim to protect fundamental rights. Moreover, under the influence of the ECHR, the position of the defense during trial has gained in importance.⁷

The Dutch criminal process can be divided into three main stages: the pre-trial stage [*voorbereidend onderzoek*] in which the criminal investigation [*opsporingsonderzoek*] is carried out, the trial stage [*eindonderzoek*],⁸ and the execution stage. The trial stage constitutes a debate amongst the actors (the judge, prosecutor and defense) with an active role for the judge, which shall result in the establishment of the substantive truth by the judge.

At the moment of the adoption of the CCP of 1926, the legislature aimed to create a system with emphasis on the truth-finding process within the trial phase, subject to the applicability of the principle of immediacy. However, due to a Supreme Court decision of 1926, where the Supreme Court accepted hearsay

⁶ Lindenberg 2002, 424 (MvT 17).

⁷ Reijntjes 2006, 11.

⁸ Currently, two types of investigative phases can be initiated pre-trial: the criminal investigation and the preliminary judicial investigation. Because the Act on Strengthening the Position of the Examining Magistrate, by which the preliminary judicial investigation will be abolished, has been adopted by the Second Chamber of Parliament on June 30, 2011 and, because it can be expected that also the First Chamber of Parliament will adopt the Act in due time, in this book the law is described according to the changes following from this Act. See on this in more detail Sects. 2.2.1.3 and 2.3.1.3.

testimony (*testimonium de auditu*) as evidence, both written and oral, the pre-trial phase has become the most crucial within the truth-finding process.⁹ Since this Supreme Court decision the principle of immediacy is no longer interpreted as requiring that all evidence is directly produced in court. Rather, the hearing of witnesses at trial has become rather an exception. Instead, the dossier contains the written testimonials of witnesses heard by the police or examining magistrate and during the trial investigation these testimonials are discussed and verified. As a consequence, the pre-trial phase has obtained increasing importance and the events during the pre-trial phase have become crucial for the final judgment.¹⁰

Over the past decades the principle of immediacy has again retrieved more attention under the influence of the case law of the ECtHR. According to Article 6 ECHR the investigation at trial must have an adversarial nature.¹¹ Consequently, the accused has the right to be present, the proceedings are held in public and the principle of immediacy applies. Because of the principle of immediacy, the judge may only use the materials discussed at trial as evidence. The judge decides what material is discussed. The defense has the right to challenge these materials.

Lastly, it must be noted that many cases, especially regarding misdemeanors, will never make it to the trial stage. A large share of all criminal cases is dealt with by out of court settlements such as fines imposed by the police or the public prosecutor or financial transactions (settlement penalties) offered by the public prosecutor to the suspect.¹²

Whereas the trial phase should have an adversarial character in observance of Article 6 ECHR, in the Dutch system the more determining pre-trial phase shall be typified as being mainly inquisitorial. Pre-trial, the suspect is merely the subject of investigation, especially during the pre-arrest stage. The police and the PPS will collect the evidence in the dossier, which will subsequently constitute the basis for any trial. The police and the PPS act on behalf of the state in the public interest, which implies that they shall investigate impartially. For that reason the PPS is formally part of the judiciary and public prosecutors are referred to as magistrates,

⁹ HR 20 December 1926, *NJ* 1927, 85.

¹⁰ Pompe 1959, 141-151.

¹¹ ECHR 28 August 1991, App. no. 11170/84; 12876/87; 13468/87 (*Brandstetter v. Austria*), para 66-67. This does not imply that only Anglo-American adversarial systems should be considered as fair considering their adversarial character. The Court emphasizes that various systems of domestic law can be used to comply with this requirement. Every system, however, should ensure that each party has equal access to filed observations and an equal opportunity to comment on the evidence (para 67). See also: ECHR 23 June 1993, Application no. 12952/87 (*Ruiz-Mateos v. Spain*), para 63.

¹² Corstens 2008, 11-12. The Dutch criminal justice system provides for the possibility to settle criminal cases by way of a transaction which takes the form of a settlement penalty. A transaction involves the voluntary payment of a sum of money to the Treasury in order to avoid further criminal prosecution and a public trial. Entering into such a settlement does not require the offender to admit his or her guilt. The offender even has a right not to be prosecuted if the crime is only punishable by a fine and if he or she pays the maximum fine that can be imposed. Articles 74 and 74A CCP.

a position which reflects the PPS's impartial responsibility, obliged to investigate incriminating and exculpatory circumstances.¹³ However, the ECtHR has recently described the PPS as follows: "although bound by requirements of basic integrity", "in terms of procedure" as a "party", which cannot be attributed the 'judiciary' characteristics of objectivity and impartiality.¹⁴ The PPS has been attributed the discretion to decide whether or not to prosecute (*opportuniteitsbe-ginsel*). Under this principle of opportunity the public prosecutor will, before resorting to prosecution, determine whether prosecuting criminal behavior also serves the public interest. The latter will be determined positively when, considering the nature of the crime, it will be obvious that a prosecution serves the public interest or when policy guidelines and/or general directions prescribe that prosecuting a particular type of offense is indicated.

It is the task of the defense to control whether during the investigation all procedural rules have been observed. The dossier constitutes the basis for controlling the pre-trial investigation. All investigative actions shall be reported and filed within the dossier. The public prosecutor is mainly responsible for the contents of the dossier with an additional role for the examining magistrate when more interests are at stake. Although during the pre-trial investigation, especially during the pre-arrest stage, the suspect is merely the subject of the investigation, pre-trial the defense is able to play an indirect role in the truth-finding process by requesting the examining magistrate to investigate certain aspects, which the suspect can do from the moment of the first police interrogation.¹⁵

2.1.3 Meaning of Some Principles and Fundamental Rights Relevant to the Criminal Investigation in Dutch Criminal Procedural Law

According to Article 93 Constitution, the provisions of the ECHR and ICCPR are directly applicable within the Dutch legal order. The Netherlands does not have a constitutional court,¹⁶ but the Constitution obliges the courts to examine the compatibility of national legislation with directly applicable provisions of

¹³ See on the role of the public prosecutor as a 'magistrate': Verrest 2011, 221-244.

¹⁴ ECHR 14 September 2010, App. no. 38224/03 (*Sanoma Uitgevers B.V. v. The Netherlands*), para 93.

¹⁵ As, upon the soon to be expected entry into force of the Act on Strengthening the Position of the Examining Magistrate (*Kamerstukken I* 2010/11, 32177, no. A), provided in Article 182 CCP (currently: Articles 36a-e CCP).

¹⁶ A proposal to amend the Constitution in order to introduce the authority for the courts to examine statutes on the basis of Constitutional provisions is currently pending as the required second round in order to amend the Constitution is still to take place (private member's bill by Halsema). See *Kamerstukken II* 2001/02, 28 331, nos. 2 and 3, *Kamerstukken I* 2008/09, 28331, *Stb.* 2009, 120 and *Kamerstukken II* 2009/10, 32334, nos. 1-3.

international treaties. The ICCPR will not be dealt with any further, considering that the interpretation of the similar rights protected in the ECHR following from the judgments of the European Court of Human Rights (ECrHR) provides for considerably more precise and elaborative conditions than the ICCPR monitoring Human Rights Committee.

When national legislation conflicts with treaty provisions, the national legislation is not applicable (Article 94 Constitution). The ECrHR may not, however, undo national legislation that provides for rights to citizens which are supplementary to the rights guaranteed in the Convention as to Article 60 ECHR. An individual who is of the opinion that state authorities have violated his or her rights as protected by the ECHR may, when domestic remedies have been exhausted, appeal to the European Court of Human Rights (ECrHR) by filing a complaint. Because almost all provisions of the ECHR are directly applicable in the Dutch legal order and the Supreme Court has understood the interpretation of these provisions by the ECrHR as being incorporated within the concerned provisions of the ECHR, the judgments of the ECrHR have an important regulatory effect on Dutch criminal procedural law.¹⁷ Therefore, in this section, next to the fundamental rights protected in the Dutch Constitution, especially some provisions of the ECHR will be dealt with as they have proven to have an important regulatory influence on the procedural framework of the criminal investigation.

2.1.3.1 The Principle of Legality

Article 1 of the CCP can be regarded as the codification of the principle of legality for criminal procedural law. It provides that criminal procedure can only be carried out in the manner provided by law. Also Article 7 of the ECHR recognizes the principle of legality as a fundamental guarantee. However, Article 7 ECHR exclusively applies to substantive criminal law.¹⁸ Hence, the scope and interpretation of this Article are irrelevant for the procedural legality requirements concerning the criminal investigation.

The principle of legality as guaranteed in Article 1 CCP is traditionally understood as expressing the requirement of a foundation in law for every governmental action that interferes with the rights or freedoms of citizens. Hence, the

¹⁷ See on this subject: Coomans and Kamminga 2007, 492-493, Besselink and Wessel 2009 and Lawson 1999, 1-132.

¹⁸ Article 7 ECHR embodies the observance of the principles “*nullum crimen, nulla poena sine lege*”, a prohibition on construing the criminal law “extensively (...) to an accused’s detriment, for instance by analogy”, the requirement that “an offence must be clearly defined in the law” and the prohibition of “retrospective application of the criminal law to an accused’s disadvantage.” ECHR 25 May 1993, App. no. 14307/88 (*Kokkinakis v. Greece*), para 52. See also: Bleichrodt 2006, 651-652. The Court has formulated the goal of Article 7 as offering “essential safeguards against arbitrary prosecution, conviction and punishment.” ECHR 22 November 1995, App. nos. 20166/92 and 20190/92 (*S.W. and C.R. v. The United Kingdom*), para 34 and 33.

principle of legality is closely related to the protection of the right to respect for private life. Restrictions to the right to respect for private life are, according to Article 8 ECHR, only permissible “in accordance with the law.”¹⁹ Law is then understood in the sense of the ECHR as referring to written as well as unwritten law, implying requirements as to the quality of the law,²⁰ while law in the sense of Article 1 CCP refers to statutory law established by Act of Parliament. The purpose of establishing this requirement of a basis in law is to guarantee legal certainty, equality for the law and to establish democratic legitimacy for governmental action that interferes with the personal freedom of citizens. Democratic legitimacy is guaranteed through requiring an Act of Parliament for every governmental power interfering with rights or freedoms. Legal certainty and equality for the law are guaranteed by codifying the specific power, which makes it—in principle—known to everyone and aims to preclude inequality in exercising the powers and in that way it protects citizens against arbitrary action by the government.

The principle of legality places obligations or responsibilities on the various actors in the criminal justice system. In the first place, responsibilities for the legislature can be derived from Article 1 CCP. The legislature is responsible for establishing law by Act of Parliament for every power that is deemed necessary for the purpose of establishing the truth about criminal offenses and which power interferes with fundamental rights and liberties. Establishing the rules for the truth-seeking process binds the government to the use of the powers subject to the conditions as laid down in law, which will further the integrity of the process. Secondly, the judiciary is responsible for respecting and guaranteeing the law when administering justice, without interpreting the law by analogy. Furthermore, the investigative officers (and any other person exercising criminal procedural powers) are responsible for carrying out their powers in accordance with the law. They shall not use powers that do not have a basis in law, they shall not use their powers for unattributed purposes and they shall use these powers by observing the legal requirements. Lastly, citizens can derive from Article 1 CCP the expectation that the government uses its powers only as provided in the law and in accordance with the law.

The principle of legality is a fundamental principle of the Dutch legal system and of a civil law system in general. It is laid down in the Constitution (Article 107) by providing that the law regulates civil law, criminal law and the civil and criminal procedural law in general codes, except for the authority to regulate certain subjects in special statutes. This provision must actually be considered as a codification principle, which is, of course, closely linked to the principle of legality. The principle of legality is, considering the legal system of the Netherlands, in fact an obligation to regulate in a code all government powers that

¹⁹ See on this in more detail [Sect. 2.1.3.2.1](#).

²⁰ Compare: ECHR 22 November 1995, App. nos. 20166/92 and 20190/92 (*S.W. and C.R. v. The United Kingdom*), para 35 and 33.

interfere with the fundamental rights of citizens. As a consequence, the CCP is also the most important source of regulation with regard to the criminal investigation.

The scope of the principle of legality is unspecified and is subject to different interpretations in the literature and the case law. In practice, the principle of legality is understood as not requiring for every governmental action a basis in law, although the legislature shall further such a basis at any time. When a basis is lacking, the courts can extend the interpretation of the powers regulated in law in accordance with fundamental principles of law.²¹ However, this is only possible when the lack of a basis in a statute is not contrary to the goal of Article 1 or in violation of Article 8(2) ECHR or Article 10 of the Dutch Constitution, which means that it can only apply to powers of the government that do not, or only to a minor extent, interfere with rights and liberties. Otherwise, the legislature is obliged to provide a basis in the law before the government may use these powers.

An important factor for determining the scope of Article 1 CCP is the meaning of ‘criminal procedure’ itself, because Article 1 only takes effect when an action can be considered as a criminal procedural action. Criminal procedure is generally understood as the entity of regulations and fundamental principles with regard to the criminal investigation, prosecution and execution.²² However, when strictly taking into account the purpose of the principle of legality—giving expression to the rule of law by requiring that every action of the government that interferes with the rights and liberties of citizens must have a foundation in law—it seems that only governmental powers which interfere with rights and liberties are covered by the term criminal procedure in the context of Article 1 CCP.²³ Limiting the term to governmental action that interferes with rights and liberties means that defense rights and procedural activities within the criminal investigation, prosecution or execution that do not interfere with rights or liberties are excluded from the principle of legality. However, because it is desirable that legal protection and the integrity of the process as a whole are guaranteed, also these rights and activities, being elements of the criminal process, have a basis in law. Article 1 of the CCP includes these activities and, for that reason, a basis in law must be established for all aspects during all phases of the criminal process. Thus Article 1 is in fact broader than the scope of the principle of legality itself when taking into account the goal that the principle is meant to serve. As soon as specific action can be considered as criminal procedure, Article 1 takes effect and a basis in law must be established for this action.

The principle of legality or, more precisely, Article 1 CCP is not subject to one unchangeable interpretation regarding its scope. It has generally been accepted that the protections given to the rule of law do not bar the interpretation of the law in

²¹ See in this regard also the Opinion of Advocate General Van Dorst para 2 at HR 19 December 1995, *NJ* 1996, 249.

²² See also: Knigge and Kwakman 2001, 244.

²³ *Ibid.*, 244-245.

accordance with the requirements and necessities of modern society.²⁴ It is in fact the task of the courts and legal academics to interpret the meaning of Article 1 and of criminal procedure according to the recent state of societal developments.²⁵ The use of governmental powers must occur according to the provisions determined by law, but these provisions often leave room for a broader interpretation.

To conclude: the principle of legality furthers legal protection, equality for the law and legal certainty by requiring a basis in law for governmental action that interferes with rights or freedoms during the criminal investigation. The principle of legality underpins the regulation of investigative powers by requiring a sufficiently precise regulation, from which citizens can derive legal certainty and protection against arbitrariness. This regulation shall make sufficiently clear under which circumstances citizens can expect that state authorities may use investigative powers against them. Furthermore, it democratically legitimizes the use of governmental power in the criminal investigation as the provisions for using criminal investigative powers have been established through the process of democratic decision-making. Hence, the principle of legality can be understood as a sword and shield with regard to the use of criminal procedural powers. With regard to its shield function the principle is closely related to the protection of the right to private life, considering that the required level of precision of the basis in law is related to the level at which the power intrudes into someone's private life.

2.1.3.2 The Right to Respect for Private Life

Activities that are conducted within the criminal investigation, more specifically the use of investigative powers, almost always affect the private life of the persons under investigation. The mere registration of information about a person already entails an interference with the private life of that person, especially when this is done on behalf of the state authorities. The underlying assumption in creating and adopting fundamental rights and liberties—such as the right to respect for private life—is to protect against unlimited and arbitrary governmental power to invade citizens' personal freedom. The government's obligation under the rule of law to obey the fundamental rights and liberties of its citizens is at the same time also a legitimization for using governmental power according to established conditions under which citizens are willing to give up some of these rights and liberties to serve other interests.²⁶ Hence, not all these activities are an actual violation of private life as protected in Article 10 of the Dutch Constitution and Article 8 ECHR (and Article 17 ICCPR and Article 7 (and 8) of the Charter for Fundamental

²⁴ See also ECHR 26 April 1979, App. no. 6538/74 (*Sunday Times v. The United Kingdom*), para. 49: "the law must be able to keep pace with changing circumstances." See also: Berkhout-van Poelgeest 2001, 25-27.

²⁵ Rozemond 1998, 202.

²⁶ 't Hart 1994, 210-212.

Rights of the European Union). Whether the right to respect for private life has been violated depends on the scope of the right to private life in the specific circumstances of a case. When there is an actual violation of the private life of a person as protected by these articles, this violation might still be justifiable if it is in accordance with the conditions of the restrictive clauses of these articles adopted to regulate the governmental interest to conduct investigative activities in observance of the right to respect for private life. Especially the interpretation of Article 8 ECHR has an important influence on the regulation of the Dutch criminal investigation.²⁷ Article 10 of the Constitution provides for additional requirements. The meaning of both Articles and their consequences for Dutch criminal procedural law will be dealt with below.

2.1.3.2.1 Article 8 ECHR

Article 8 ECHR reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The “essential object” of Article 8 is “to protect the individual against arbitrary action by the government.”²⁸ Article 8 does not prohibit all interferences with private life, by providing for a restrictive clause in the second paragraph.²⁹ The wording of the restrictive clause of Article 8 involves an obligation to regulate to a certain extent the use of its criminal procedural powers when this use possibly interferes with the private life of individuals. The precise scope of Article 8 ECHR and, thus, what activities of state authorities must meet the standards of the restrictive clause, is rather vague. In addition, the Court provides the states with “a certain margin of appreciation” for striking a balance between “the competing interests of the individual and of the community as a whole.”³⁰

²⁷ The provisions of the ECHR are directly binding on all subjects in the Member States. According to the Dutch Constitution the provisions of international treaties with such a character become an integral part of the Dutch legal order, without it being necessary to implement them in national law. They only need to be properly announced (Article 93 Constitution). The provisions of the ECHR prevail over conflicting national provisions (Article 94 Constitution).

²⁸ ECHR 27 October 1994, App. no. 18535/91 (*Kroon and Others v. The Netherlands*), para 31.

²⁹ ECHR 24 June 2004, App. no. 59320/00 (*Von Hannover v. Germany*), para 57.

³⁰ *Ibid.*, para 31.

To determine whether the use of an investigative power constitutes, in the specific circumstances of a case, a violation of the right to respect for private life, it must, in the first place, be assessed whether the use of the power constitutes an interference with private life as meant in Article 8(1) ECHR. The scope of the right to respect for private and family life is not static, but depends on “present day conditions and developments in social and political attitudes.”³¹

In its judgments the Court has decided that the concept of private life includes someone’s physical and psychological integrity, aspects relating to someone’s personal identity, activities in someone’s private as well as professional life and that it entails a “zone of interaction” with other people which can extend to a public context.³² This flexible interpretation of the right to private life has in the specific circumstances of the case been determined by the Court on the basis of the ‘reasonable expectation of privacy test’ to determine whether a person with certain activities in the public domain “knowingly or intentionally” involves himself in a situation in which these activities may be reported or recorded.³³ This does not mean that all observations or recordings done in a public setting do not constitute interference with someone’s private life. Neither does it mean that all activities “knowingly or intentionally” disposed to the public fall outside the scope of the right to respect for private life: “a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor.”³⁴ For instance, in the case of *Halford* the Court also considered other factors to determine that someone could have “a reasonable expectation of privacy” in that telecommunications were not intercepted when using internal telecommunications on business premises, such as the “sole use of her office where there were two telephones, one of which was specifically designated for her private use.”³⁵ Moreover, once observations in the public scene, “even without the use of covert surveillance methods”, obtain a systematic character and result in the “storing of data (...) on particular individuals,” which was the case in *Uzun v. Germany* through the use of GPS surveillance, the Court has concluded that there is interference with private life.³⁶ On the contrary, the Court has ruled that someone becoming involved in the drugs trade “must have been aware from then on that he was engaged in a criminal act (...) and that consequently he was running the risk of

³¹ Loof 2005, 204.

³² See e.g.: ECHR 24 June 2004, App. no. 59320/00 (*Von Hannover v. Germany*) para 50 and ECHR 25 September 2001, App. no. 44787/98 (*P.G. and J.H. v. The United Kingdom*), para 56, ECHR 25 October 2007, App. no. 38258/03 (*Van Vondel v. The Netherlands*), para 48, and ECHR 2 September 2010, App. no. 35623/05 (*Uzun v. Germany*), para 43.

³³ ECHR 25 September 2001, App. no. 44787/98 (*P.G. and J.H. v. The United Kingdom*), para 57 and ECHR 2 September 2010, App. no. 35623/05 (*Uzun v. Germany*), para 44.

³⁴ ECHR 2 September 2010, App. no. 35623/05 (*Uzun v. Germany*), para 44.

³⁵ ECHR 25 June 1997, App. no. 73/1996/692/884 (*Halford v. The United Kingdom*), para 45. See also ECHR 24 June 2004, App. no. 59320/00 (*Von Hannover v. Germany*), para 51.

³⁶ ECHR 2 September 2010, App. no. 35623/05 (*Uzun v. Germany*), para 44-46 and 52.

encountering an undercover police officer whose task would in fact be to expose him.”³⁷ However, this presumes that the government should be convinced beforehand of someone’s involvement in a criminal act, whereas the investigation aims to establish the truth about that criminal offense. Hence, someone’s involvement in a criminal act has never been repeated by the ECtHR as a factor to determine the reasonableness of someone’s expectation of privacy.³⁸

To summarize: the concept of private life is rather broad and interference by public authorities with one’s private life is generally not difficult to prove. More important is the question whether such interference constitutes a violation of Article 8 ECHR.

If the activities of public authorities do result in interference with the right to respect for private life as protected in Article 8(1), the restrictive clause of Article 8(2) prescribes that a legitimization for such activities is required under the law. ECHR Article 8 allows limitations if they are “in accordance with the law” and if “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and liberties of others.”³⁹

It is not important what kind of law is sufficient for a restriction that is in accordance with the law. This, in the first place, is an issue for the domestic courts to consider. The Court has at least stated in its judgments that it is irrelevant whether the basis in law concerns case law or an Act of Parliament.⁴⁰ The Court “understood the term law in its substantive sense,” which includes lower-rank acts and unwritten law.⁴¹ It is the primary task of the domestic courts to determine whether this basis in law can in their legal system count as being ‘in accordance with the law’. The requirement of ‘in accordance with the law’ is meant to refer to a basis in national law that provides for the restriction as well as to the quality of that law. The Court refers to the rule of law, in relation to this condition of being ‘in accordance with the law’, by stating that the quality of the law means that it should be compatible with the rule of law in the sense that it protects against arbitrary interferences by public authorities.⁴² The presence of a basis in domestic law is, thus, insufficient for meeting the requirement of being ‘in accordance with

³⁷ ECHR 15 June 1992, App. no. 12433/86 (*Lüdi v. Switzerland*), para 40.

³⁸ Corstens 2008, 278.

³⁹ Article 8(2) ECHR.

⁴⁰ In the Netherlands, the Constitution requires that the ‘basis in law’ has been established by Act of Parliament. See on this the next section (2.1.3.2.2).

⁴¹ ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huvig v. France*), para 29/28; ECHR 2 August 1984, App. no. 8691/79 (*Malone v. The United Kingdom*), para 66.

⁴² ECHR 2 August 1984, App. no. 8691/79 (*Malone v. The United Kingdom*), para 67 and ECHR 25 March 1983, App. no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (*Silver and Others v. The United Kingdom*), para 90.

the law'. In addition, this basis in law must meet certain requirements regarding its quality.

The Court defines 'quality of the law' more precisely by formulating the requirements of the foreseeability and accessibility of the basis in the law. The Court has interpreted "prescribed by law" (which wording is understood as having the same meaning as 'in accordance with the law') as referring to "the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law."⁴³ The ECHR further explained the terms foreseeable and accessible in *Sunday Times* (1979) by ruling that the law providing for the limitation on the right to freedom of expression (Article 10) must be sufficiently adequately accessible and should be sufficiently precisely formulated.⁴⁴ The requirement of foreseeability is subsequently mitigated by stating that a person must be able to foresee the consequences of his or her conduct to "a degree that is reasonable."⁴⁵ This interpretation of prescribed by law has been adopted *mutatis mutandis* for the interpretation of 'in accordance with the law' as the requirement for legitimate interference with the right to private life in Article 8(2) ECHR.⁴⁶ Both requirements have been further developed in the case law of the ECtHR.

Furthermore, the restriction shall be adopted for a legitimate aim—one of the aims enumerated in Article 8(2)—and be necessary in a democratic society, which means that "the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued."⁴⁷

The more precise elaboration of the different requirements of Article 8(2) ECHR will be dealt with in [Sect. 2.3.2.1](#) in order to determine the protective conditions that follow from Article 8 ECHR concerning the regulation of criminal investigative powers.

⁴³ ECHR 25 March 1998, App. no. 13/1997/797/1000 (*Kopp v. Switzerland*), para 55; ECHR 16 February 2000, App. no. 27798/95 (*Amann v. Switzerland*), para 50 (and 56); ECHR 26 April 1979, App. no. 6538/74 (*Sunday Times v. The United Kingdom*), para 49; ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huvig v. France*), para 30/29.

⁴⁴ ECHR 26 April 1979, App. no. 6538/74 (*Sunday Times v. The United Kingdom*), para 49. The principle applies *mutatis mutandis* to Article 8: ECHR 25 March 1983, App. no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (*Silver and Others v. The United Kingdom*), para 85.

⁴⁵ ECHR 26 April 1979, App. no. 6538/74 (*Sunday Times v. The United Kingdom*), para 49.

⁴⁶ ECHR 2 August 1984, App. no. 8691/79 (*Malone v. The United Kingdom*), para 66 and ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huvig v. France*), para 30/29.

⁴⁷ ECHR 26 March 1987, App. no. 9248/81, para 58 (*Leander v. Sweden*). See also ECHR 25 March 1983, App. no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (*Silver and Others v. The United Kingdom*), para 97.

2.1.3.2.2 Article 10 Constitution

Besides the requirements for legitimate interferences by public authorities with the private lives of individuals as extensively elaborated by the European Court, also the Dutch Constitution has a regulating influence on the exercise of criminal investigative powers. According to Article 10 of the Constitution everyone has the right to respect for private life, except for limitations on this right provided by the law.⁴⁸

The scope of the right to private life as adopted in the Constitution is rather vague. The legislature intended that the courts would develop the lines for a more precise interpretation of the scope of these rights. Elaborations of the right to private life can be found in the more specific rights formulated in Article 11-13 of the Constitution, providing for the right to respect for the integrity of the body, homes and the confidentiality of mail. The legislature explained the right to private life as the right to live one's life with as little interference from outside as possible. The Dutch Supreme Court has in some cases interpreted the scope of the right to private life as being similar to the reasonable expectation of privacy test, as also applied by the ECtHR. However—and also similar to the approach of the ECtHR—this test is not decisive for the Supreme Court to assess whether a particular situation contributes to a violation of the right to private life. In each case the Supreme Court separately balances the concrete circumstances and interests that are relevant for the scope of the right to private life. Important factors to be considered are the assessment of a particular situation by police officers as well as the actual entitlement of a person in a particular situation to privacy.⁴⁹

Restrictions on the right to privacy are, according to Article 10 of the Dutch Constitution, allowed if 'provided by the law', which means according to the letter of the Constitution that an Act established by Act of Parliament shall provide for the restriction. For this reason, Article 10 Constitution is complementary to Article 8 ECHR, considering that requiring law established by Act of Parliament further narrows down the ECHR requirement 'in accordance to the law', which also allows for law of a different nature, such as case law⁵⁰ (see the previous section). In fact, this is the most important regulatory consequence of Article 10 in addition to those following from Article 8 ECHR.

⁴⁸ Article 10(1) Constitution of the Kingdom of the Netherlands [*Grondwet voor het Koninkrijk der Nederlanden*].

⁴⁹ See, for instance, HR 19 March 1996, *NJ* 1997, 85, para 6.2 and the annotation by Knigge, para 2 and 3.

⁵⁰ In common law countries the principle of legality may be served by referring to a legal basis in case law, which is thus also a permitted interpretation of Article 8(2) ECHR.

2.1.3.3 The Right to a Fair Trial

The right to a fair trial has not been included in the Dutch Constitution,⁵¹ for which reason resort will be had to the ECHR to determine the relevance of the right for Dutch criminal investigation. The right to a fair trial is elaborated in Article 6 ECHR and, as a result, specific fair trial requirements as well as the notion of fair trial, as such, are relevant to Dutch criminal procedural law. Article 6 ECHR provides for the right to a fair trial as a fundamental aspect of the rule of law.⁵² Article 6 provides that: “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Furthermore, the “judgment shall be pronounced publicly”, save for some exceptions. The presumption of innocence is contained in the second section of Article 6. The third section of Article 6 attributes some specific minimum rights for “everyone charged with a criminal offence”.

Article 6 aims to protect against arbitrary state action in criminal law, which has resulted in the formulation of some specific minimum rights that should be guaranteed in criminal proceedings. Most of these rights concern the position of the accused, such as the right to a fair and public hearing within a reasonable time (Article 6(1)), the right to be presumed innocent (Article 6(2)), the right to be informed of the accusation against him (Article 6(3)a) and the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (Article 6(3)d)). This section will, firstly, elaborate on the presumption of innocence and, secondly, address the basic fairness requirements for the criminal proceedings as a whole, following from Article 6 ECHR.

2.1.3.3.1 The Presumption of Innocence

The presumption of innocence, as one of the requirements of the right to a fair trial provided in Article 6(2) (and also recognized in Article 14(2) ICCPR), has only limited consequences for the criminal investigation. As will appear later, the presumption of innocence as a fundamental principle of law does have

⁵¹ The aspects covered by the right to a fair trial were considered as an inherent part of the requirement of an independent judiciary, a fundamental principle of the ‘Rechtsstaat’ and, hence, implied in the Constitutional provisions requiring an independent judge to decide on legal conflicts (as guaranteed in the Constitution, Articles 112 and 113(1)). Corstens 2008, 53. Currently the inclusion of the right to a fair trial in the Constitution is being considered. The ‘State Commission on the Constitution’ (*Staatscommissie Grondwet*) concluded in its report of November 2010 in favor of including the right to a fair trial in the Constitution. Rapport Staatscommissie Grondwet 2010. See also: Mevis 2009A.

⁵² See also the Preamble to the European Convention on Human Rights.

considerable consequences for criminal proceedings, *including* the criminal investigation.⁵³

According to Article 6(2) ECHR “[e]veryone charged with a criminal offense shall be presumed innocent until proved guilty according to the law.” Article 6(2) “governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution,”⁵⁴ which corresponds with the general interpretation of Article 6 that the fairness of the trial depends on the proceedings as a whole. The applicable principle for determining whether there has been a violation of the presumption of innocence reads as follows:

“the presumption of innocence will be violated if, without the accused’s having previously been proved guilty according to the law and, notably without having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may even be so in absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.”⁵⁵

In the context of the ECHR the presumption of innocence concerns primarily a “rule of evidence and decision.”⁵⁶ As an element of the fundamental right to a fair trial, the presumption of innocence “constitutes a measure of protection against error in the process and a counterweight to the immense power and resources of the State compared to the position of the defendant.”⁵⁷

Article 6(2) ECHR has been applied by the Court so as to cover issues such as the division of the burden of proof (the reversal of the burden of proof is, in principle, forbidden)⁵⁸ and a prohibition on any statements made by public officials about the guilt of a person when his guilt has eventually not or not yet been proven according to the law (e.g. in the media).⁵⁹

However, the ECtHR clearly distinguishes the state of a reasonable suspicion from statements about the guilt or innocence of someone.⁶⁰ The state of a reasonable suspicion, in fact constituting some proof concerning someone’s guilt, may justify a less strict application of the presumption of innocence. This means, for instance, that in the case of a *prima facie* case the refusal to testify (the right to

⁵³ See on this [Chap. 8](#), [Sects. 8.3.1.1](#) and [2.3.2.3.3](#).

⁵⁴ ECHR 25 March 1983, App. no. 8660/79 (*Minelli v. Switzerland*), para 30, ECHR 6 February 2007, App. no. 14348/02 (*Garycki v. Poland*), para 68.

⁵⁵ ECHR 25 March 1983, App. no. 8660/79 (*Minelli v. Switzerland*), para 37. See also: ECHR 28 October 2003 App. no. 44320/98 (*Baars v. The Netherlands*), para 26.

⁵⁶ Van Slidregt 2009, 22 and 27.

⁵⁷ Ashcroft 2009, 72.

⁵⁸ ECHR 5 July 2001, App. no. 41087/98 (*Philips v. The United Kingdom*), para 32.

⁵⁹ ECHR 25 March 1983, App. no. 8660/79 (*Minelli v. Switzerland*), para 37. See also: ECHR 28 October 2003 App. no. 44320/98 (*Baars v. The Netherlands*), para 26, ECHR 28 October 2004, Requête nos 48173/99 et 48319/99 (*Y.B. et autres c. Turquie*), para 43 and ECHR 6 February 2007, App. no. 14348/02 (*Garycki v. Poland*), para 66.

⁶⁰ ECHR 28 October 2004, Requête nos. 48173/99 et 48319/99 (*Y.B. et autres c. Turquie*), para 47, ECHR 28 October 2003 App. no. 44320/98 (*Baars v. The Netherlands*), para 28, ECHR 6 February 2007, App. no. 14348/02 (*Garycki v. Poland*), para 67.

a ‘fair hearing’ also implies the privilege against self-incrimination and the right to remain silent) may justify drawing adverse interferences, if such adverse interferences do not result in a reversal of the burden of proof.⁶¹ Hence, the presumption of innocence shall also not be understood as a prohibition on investigating crimes, imposing pre-trial detention and initiating criminal proceedings. Instead, in the pre-trial phase, the presumption of innocence shall *in abstracto* be considered as a normative notion that controls, rather than hinders, the criminal procedure.⁶² Also the goal of Dutch criminal procedural law has been formulated around the presumption of innocence with more general protective implications: the criminal process must be aimed at establishing the substantive truth; guaranteeing that the Penal Code is applied to the guilty, while minimizing the possibility that the innocent are affected by criminal procedural law.⁶³

This more abstract and broader regulatory influence of the presumption of innocence on the criminal proceedings as a whole does not directly follow from the interpretation given to the presumption as provided in Article 6(2) ECHR, focusing on its meaning for the fairness of the criminal proceedings, as a rule of evidence and decision. Instead, it concerns a fundamental notion for the criminal justice system under the rule of law, because it recognizes the inviolability of human dignity and its reflection on the government’s use of its powers. From that perspective, the presumption of innocence shall be understood as imposing restrictions on the use of criminal investigative powers, considering that the criminal procedure is aimed at establishing the truth by being continuously orientated towards the possibility that the suspect is innocent until the contrary—his guilt—has been proven in a court of law,⁶⁴ and, consequently, limiting the use of criminal investigative powers to that which is necessary and for the purpose of establishing the substantive truth (and not for punitive purposes).⁶⁵ This particular regulatory effect of the presumption of innocence will not be dealt with further at this point, as it does not directly impose specific regulatory consequences on the Dutch criminal justice system. Rather, the principle shall be considered as (one of) the rationales behind rights and principles that prohibit arbitrary and unnecessary interferences with privacy rights, the principles of proportionality and subsidiarity,⁶⁶ the principle of *détournement de pouvoir*⁶⁷ and the idea of the criminal justice system as the *ultimum remedium*.

⁶¹ ECHR 8 February 1996, Case no. 41/1994/488/560 (*John Murray v. The United Kingdom*), para 51-54.

⁶² Stuckenberg 1997, 74.

⁶³ Lindenberg 2002, 420 (MvT 3) and Groenhuijsen and Knigge 2001, 17-18.

⁶⁴ Krauß 1971, 156 and 176.

⁶⁵ More on the presumption of innocence as a fundamental principle under the rule of law regulating the criminal process, including the use of criminal investigative powers, in [Chap. 8, Sect. 8.3.1.1.](#)

⁶⁶ See [Sect. 2.1.3.4.1.](#)

⁶⁷ See [Sect. 2.1.3.4.2.](#)

2.1.3.3.2 Implications of Article 6 ECHR for Pre-Trial Proceedings

The right to a fair trial is connected with the originally common-law notion of due process. Due process or fair trial aims to guarantee the effective realization of other substantive rights and liberties in the course of fair judicial proceedings.⁶⁸ The ECHR has interpreted the fairness of proceedings to entail the proceedings ‘as a whole’: the Court will “ascertain whether the proceedings in their entirety, including in the way in which evidence was taken, were fair.”⁶⁹ For that reason, Article 6 ECHR also has consequences for the manner in which the criminal investigation is organized and conducted.

When the Court considers the course of the pre-trial phase in relation to the trial phase, it will not assess the rules on the admissibility of evidence that apply under national law (this is a matter of regulation by national law), but will only determine whether the proceedings as a whole were fair.⁷⁰ The fairness of the procedure as a whole is a requirement that is read into Article 6(1) ECHR. The ECHR has set three basic conditions in order to determine whether the proceedings as a whole have been fair. Firstly, the trial must have an adversarial character. An adversarial trial implies that both prosecution and defense must have knowledge of and be able to challenge all evidence produced. Secondly, the principle of equality of arms must be observed. Equality of arms gives the accused the right to have the same means as the prosecutor to challenge the evidence and to present his or her own evidence.⁷¹ Thirdly, the principle of immediacy shall be observed, which gives the accused the right to be present at trial and to have the evidence presented during trial.⁷² However, the principle of immediacy does not preclude using statements obtained in the pre-trial stage, as often occurs in the Netherlands as a consequence of the acceptance of *de auditu* testimony.⁷³ The Court accepts this practice provided that the rights of the defense are sufficiently respected in the

⁶⁸ Ölçer 2008, 71.

⁶⁹ See e.g.: ECHR 16 December 1992, App. no. 13071/87 (*Edwards v. The United Kingdom*), para 34 and ECHR 9 June 1998, case 44/1997/828/1034 (*Teixeira de Castro v. Portugal*), para 34.

⁷⁰ E.g.: ECHR 12 July 1988, App. no. 10862/84 (*Schenk v. Switzerland*), para 46, ECHR 18 March 1997, Reports 1997-III (*Van Mechelen v. The Netherlands*), para 50, ECHR 9 June 1998, case 44/1997/828/1034 (*Teixeira de Castro v. Portugal*), para 34, and ECHR 12 May 2000, App. no. 35394/97 (*Khan v. The United Kingdom*), para 34.

⁷¹ ECHR 22 July 2003, App. no. 39647/98 and 40461/98 (*Edwards and Lewis v. The United Kingdom*), para 52: “(i)t is in any event a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.”

⁷² ECHR 20 November 1989, App. no. 11454/85 (*Kostovski v. The Netherlands*), para 41 and ECHR 10 November 2005, App. no. 54789/00 (*Bocos-Cuesta v. The Netherlands*), para 67-68.

⁷³ See Sect. 2.1.2.

sense that the defense has been given an adequate opportunity to test the evidence introduced, including having been given the opportunity to examine or have examined the witnesses against him or her. All three conditions mentioned have been established in order to guarantee that the defense is not restricted in the exertion of its rights, and to guarantee that the manner in which evidence is obtained and used is fair. In *Teixeira de Castro v. Portugal* the Court stressed that “the general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex.”⁷⁴

Considering that it may still be possible to compensate in the trial phase for illegitimate aspects which occurred in the pre-trial phase, only upon the determination that it will be *impossible* to effectuate the right to a fair trial during trial can the conclusion be drawn that illegitimate aspects during the pre-trial phase will constitute a violation of the right to a fair trial. Hence, the rights of Article 6 may also be relevant for the pre-trial phase “in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.”⁷⁵ During the criminal investigation the truth-finding actors shall already anticipate the observance of the requirement of adversarial proceedings and the requirement of equality of arms. The accused must be able to challenge the evidence collected during the criminal investigation. This requires a certain level of transparency concerning the investigation: the accused must have sufficient insight into the manner of obtaining the evidence and the source of the evidence.

Directly related thereto is the obligation for the prosecutor “to disclose to the defence all material evidence for or against the accused.”⁷⁶ However, this is not an absolute right as competing interests such as “national security”, the “need to protect witnesses”, the need to “keep secret police methods of criminal investigation” or in order to “preserve the fundamental rights of another individual or to safeguard an important public interest” may outweigh certain requirements of a fair trial.⁷⁷ In general, as a result of the assessment by the Court of the procedure as a whole, there is a possibility to rectify shortcomings with regard to the position of the defense. For example, in *Doorson v. The Netherlands* “the interests of the defence are balanced against those of witnesses or victims called upon to testify”, as the Member States in their criminal proceedings should also protect the life, liberty and security of victims and witnesses.⁷⁸ The Court shall ascertain whether the limitations on the defense rights were strictly necessary and permissible under Article 6(1), requiring a decision-making procedure that observes the requirements

⁷⁴ ECHR 9 June 1998, case 44/1997/828/1034 (*Teixeira de Castro v. Portugal*), para 36.

⁷⁵ ECHR 24 November 1993, App. no. 13972/88 (*Imbriosca v. Switzerland*), para 36.

⁷⁶ ECHR 16 December 1992, App. no. 13071/87 (*Edwards v. The United Kingdom*), para 36.

⁷⁷ ECHR 25 September 2001, App. no. 44787/98 (*P.G. and J.H. v. The United Kingdom*), para 68.

⁷⁸ ECHR 26 March 1996, Reports 1996-II (*Doorson v. The Netherlands*), para 70. See also: ECHR 18 March 1997, Reports 1997-III (*Van Mechelen v. The Netherlands*), para 52-53.

of adversarial proceedings and equality of arms, and has incorporated sufficient safeguards to protect the interests of the accused.⁷⁹ Decisive for the Court to determine whether in a specific case limitations on the defense rights constitute a violation of the right to a fair trial is the question whether the handicaps for the defense have been sufficiently counterbalanced.

In several cases the Court has assessed events during the pre-trial stage in relation to the fairness of the procedure as a whole. For example, in *Teixeira de Castro* the Court stated that “the use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking. While the rise in organized crime undoubtedly requires that appropriate measures be taken (...) [t]he public interest cannot justify the use of evidence obtained as a result of police incitement.” The applicant was deprived of his right to a fair trial because undercover agents had “instigated the offence and there is nothing to suggest that without their intervention it would have been committed.” The Court took into account that the conviction was mainly based on the statements of the undercover agents.⁸⁰ Furthermore, in cases concerning the use of anonymous witnesses in the Netherlands, the Court has considered that reliance on anonymous sources is not precluded at the investigation stage, but the “subsequent use of their statements by the trial court to found a conviction is however capable of raising issues under the Convention.”⁸¹ The use of undercover agents during the criminal investigation, who then produce evidence as anonymous witnesses at trial, is considered to be permitted if the handicaps of the defense are sufficiently counterbalanced by the procedure followed by the judicial authorities and if the conviction is not solely, or to a decisive extent, based upon the testimony of these witnesses.⁸²

Another example concerning the procedure during the criminal investigation is the situation in which evidence has been obtained during the criminal investigation in violation of another right protected by the ECHR. It turns out that the use of evidence gathered in violation of Article 8 ECHR does not automatically result in a violation of the right to a fair trial. For determining whether the trial as a whole is fair in such a situation, the Court assesses whether the rights of the defense were not disregarded taking into account the possibility to counterbalance and whether the

⁷⁹ ECHR 25 September 2001, App. no. 44787/98 (*P.G. and J.H. v. The United Kingdom*), para 68.

⁸⁰ ECHR 9 June 1998, case 44/1997/828/1034 (*Teixeira de Castro v. Portugal*), para 36 and 39.

⁸¹ ECHR 20 November 1989, App. no. 11454/85 (*Kostovski v. The Netherlands*), para 44, ECHR 26 March 1996, Reports 1996-II (*Doorson v. The Netherlands*), para 69.

⁸² This assessment has led to the conclusion in ECHR 20 November 1989, App. no. 11454/85 (*Kostovski v. The Netherlands*), para 43-45 and ECHR 18 March 1997, Reports 1997-III (*Van Mechelen v. The Netherlands*), para 59-65, that the right to a fair trial had been violated. In ECHR 26 March 1996, Reports 1996-II (*Doorson v. The Netherlands*), para 74-76, the use of anonymous witnesses endured the test of the ECHR.

illegally obtained evidence is not the only basis for the conviction. Consequently, when evidence obtained in violation of a right protected in the ECHR—e.g. Article 8—is used as evidence in a domestic criminal trial, this does not necessarily mean that also Article 6 ECHR has been violated.⁸³ Nevertheless, the Court considers questions as to the admissibility of evidence and the question whether or not illegally obtained evidence requires procedural sanctions to be primarily a matter for domestic law.⁸⁴

It would be going beyond the scope of this book to deal with all implications of respecting the right to a fair trial and violations thereof. The previous examples may illustrate the manner in which the Court deals with events during the pre-trial phase in relation to the right to a fair trial. Obviously, it is necessary to anticipate, already during the pre-trial investigation, whether, during the trial phase, the judge will assess the fairness of the procedure as a whole. This influences the manner in which the pre-trial investigation should be organized. The most important consequence seems to be the required transparency of the pre-trial proceedings, in order to enable control and to prevent the defense from being hindered in exercising its rights. A ‘secret investigation’, without revealing all applied methods and sources before or during trial, seems to clash with the right to an adversarial trial and equality of arms. However, under some circumstances the Court has accepted limitations on defense rights, for instance, if this is in the interest of national security or in order to protect the rights of victims or witnesses. These limitations are only justified if they are sufficiently counterbalanced and if the conviction is not only, or to a decisive extent, based on the evidence regarding which defense rights have been limited.

2.1.3.4 The Principles of the Due Administration of Justice

Principles of the due administration of justice [*beginnselen van behoorlijke procesorde*] are unwritten principles that aim to guarantee, supplementary to the statutory conditions, the legitimacy of the criminal process where the law affords discretion, including the criminal investigation. The principles of the due administration of justice can in that regard be understood as guiding the investigative officer or the public prosecutor in the manner in which a criminal investigative power is applied or where the investigative officer has the discretion to choose between different investigative methods.⁸⁵ The judge is held to control the exertion of an investigative power and the choice between different investigative possibilities also on the basis of these principles of the due administration of justice.

⁸³ ECHR 12 July 1988, App. no. 10862/84 (*Schenk v. Switzerland*), para 46-48 and ECHR 12 May 2000, App. no. 35394/97 (*Khan v. The United Kingdom*), para 36-40.

⁸⁴ See on the relevant domestic law Sect. 2.3.1.4 and Franken 2004A, 14-16.

⁸⁵ Corstens 2008, 62-63.

The Supreme Court has acknowledged the regulatory effect of the principles of the due administration of justice in a case where the investigative officer had entered a home, where illegal radio broadcasting activities took place, by breaking a window. The Supreme Court formulated in this case that investigative activities in accordance with the statutory requirements are not per se legitimate. In addition, the judge shall examine the activities on the basis of the principles of the due administration of justice.⁸⁶ These principles of the due administration of justice concern principles that have been developed in administrative law: the principle of legitimate expectations, the principle of equality before the law, the principles of proportionality and subsidiarity and the prohibition on *détournement de pouvoir* (or: abuse of power). For the criminal investigation the principles of proportionality and subsidiarity and the prohibition on *détournement de pouvoir* are in particular relevant and will therefore be dealt with in more detail.

2.1.3.4.1 Proportionality and Subsidiarity

The principles of proportionality and subsidiarity have an important regulatory meaning in the Dutch system of criminal procedural law by requiring a reasonable assessment of all the interests involved. The regulatory influence of the principles of proportionality and subsidiarity is present on the abstract level of the adoption of criminal investigative policy as well as on the concrete level in the sense that any use of criminal investigative powers must be in compliance with the principles of proportionality and subsidiarity.

The principles of proportionality and subsidiarity require that the adoption of specific statutory provisions for criminal procedural powers is the product of the assessment of the interest of criminal law enforcement and the interest of protection against arbitrary interferences with the rights and liberties of citizens. This means, for the adoption of statutory law, providing the legal basis for a criminal investigative method so that the scope and nature of the method correspond with the need for a specific investigative power (proportionality) and that the specific method is also necessary for achieving the investigative need (subsidiarity).⁸⁷ Providing the government with broader or more investigative powers than necessary in order to pursue the purpose of criminal investigation (truth-finding regarding criminal offenses in order to prosecute and convict the guilty) would be in violation of the principles of proportionality and subsidiarity.

On the concrete level the principles of proportionality and subsidiarity have a regulatory influence in addition to the legal requirements (which are thus themselves a product of an assessment of proportionality and subsidiarity) for the use of criminal investigative powers, as acknowledged by the Supreme Court for the first time in 1978.⁸⁸ In this case the breaking of the window to enter the house was

⁸⁶ HR 12 December 1978, *NJ* 1979, 142 ann. GEM.

⁸⁷ Corstens 2008, 71.

⁸⁸ HR 12 December 1978, *NJ* 1979, 142 ann. GEM.

considered to violate the principle of subsidiarity.⁸⁹ The principles of proportionality and subsidiarity should continuously direct the actors applying criminal investigative powers in addition to the requirements of the law. Also the trial judge should examine whether the investigative activities have been in compliance with these principles, for which purpose the trial judge will only conduct a marginal examination to determine whether the police and/or the PPS could reasonably conduct the specific criminal investigative activities.⁹⁰ Furthermore, the application of these principles to the criminal investigation follows from the wording of Article 8 ECHR, which requires any restrictions on the right to respect for private life to be ‘necessary in a democratic society’. In addition, some bases in law for the use of investigative methods require an assessment of proportionality and subsidiarity, for example, by subjecting the use of the investigative method to the requirement of ‘in the interest of the investigation’ or ‘upon a pressing investigative need’.⁹¹

The principles of proportionality and subsidiarity require from the actors deciding on the use of criminal investigative powers and responsible for applying the power in question that in each individual case an assessment is made whether the use of the power in the light of the specific circumstances of the cases is also proportionate and concerns the least intrusive method in order to achieve the intended investigative goal. Consequently, the principles are considered to have an important regulatory influence during the entire criminal investigation influencing particular criminal investigative decisions (such as on the use of intrusive special investigative techniques) and the execution of specific criminal investigative powers on behalf of the police.⁹² Nevertheless, the principles are also often used as arguments *justifying* a more intrusive application of criminal investigative powers, for which reason the value of the principles as protective principles appears to be primarily theoretical.⁹³

⁸⁹ *Ibid.*

⁹⁰ E.g. HR 12 December 1978, *NJ* 1979, 142 ann. GEM (where the violation of the principle of subsidiarity resulted in the exclusion of evidence), see also HR 30 March 2004, *NJ* 2004, 376, ann. YB. See in more detail on the manner in which the trial judge exerts control on the criminal investigation in observance of the principles of the due administration of justice [Sects. 2.3.1.4](#) and [2.3.2.4.2](#).

⁹¹ Compare: Franken 2009, 83-84.

⁹² As also explicitly mentioned in the Guide for the Criminal Investigative Practice [*Handboek voor de opsporingspraktijk*], supplement: *Stcrt.* 10 December 2007, no. 239/p. 11, 1 and 2. This Guide is not an independent source of regulation, but concerns an explanation of the Directive for criminal investigative powers [*Aanwijzing opsporingsbevoegdheden*], *Stcrt.* 24 February 2011, no. 3240, 2. (the directive also refers in some places to the applicability of the principles of proportionality and subsidiarity).

⁹³ The actual protective meaning of the principles seems to be currently limited in practice. Franken 2009, 83-84. More on this in [Chap. 4, Sect. 4.2.3.2](#).

2.1.3.4.2 Prohibition on *Détournement de Pouvoir*

The prohibition on *détournement de pouvoir* limits the use of criminal investigative powers to the purpose for which the power has been attributed. Hence, the prohibition on *détournement de pouvoir* can also be understood as a principle of purpose limitation. For criminal investigative powers, this means that the powers can only be used for the purpose of establishing the substantive truth with regard to criminal offenses (or the making of prosecutorial decisions⁹⁴). Usually the purpose limitation is also implied in the specific statutory provision providing for a criminal investigative power. For example, the threshold of a reasonable suspicion, in combination with a requirement that the power shall be used ‘in the interest of the investigation’, implies that the use of the power is limited to the clarification of the reasonable suspicion for the purpose of making prosecutorial decisions.

The principle of purpose limitation also applies outside the context of criminal procedural law, for example to intelligence investigative activities or to administrative supervisory powers used for the purpose of the administrative enforcement of the law. The principle of purpose limitation also prohibits the use of these powers for purposes other than, respectively, the protection of national security and the administrative enforcement of the law (maintenance of public order). These powers may thus not be used for criminal law enforcement purposes.⁹⁵

2.2 The Sword Function of the Dutch Criminal Investigation

2.2.1 *The Actors Responsible for Truth-Finding*

The actors responsible for the criminal investigation are the police, the public prosecution service (PPS) and the examining magistrate. The suspect and/or defense are not dealt with, as the criminal investigative phase is in this project limited to the covert, pre-arrest phase, conducted beyond the awareness of the suspect, which means that there is, as yet, no role for the suspect and/or the defense to play with regard to contributing to truth-finding.⁹⁶ Hence, it is sufficient to mention that the defense does have possibilities from the moment of the first police interrogation to request the examining magistrate to conduct some specific

⁹⁴ As the purpose of the criminal investigation has been described in Article 132a CCP, which provides for the definition of the criminal investigation.

⁹⁵ Corstens 2008, 69-70.

⁹⁶ Although during a covert criminal investigation the suspect will not yet be able to contribute to truth-finding, the suspect, once identified as such, is entitled to certain procedural protection. See on this [Sect. 2.3.1.5](#).

investigative action (Article 182 CCP⁹⁷) already during the pre-trial phase.⁹⁸ This division of responsibility for the criminal investigation among the police, the public prosecution service and the examining magistrate provides for three levels of shared responsibilities, partly in a hierarchical structure. The responsibility with regard to the course of events during the criminal investigation in its entirety is a shared individual responsibility of the public prosecutor and the examining magistrate. For the use of specific investigative powers during the criminal investigation, depending on the interests involved, a ‘higher’ actor will be responsible and will be given the power to employ or authorize investigative powers.

Article 141 of the CCP determines which actors are responsible for the criminal investigation: public prosecutors, law enforcement (police) officers and members of the Royal Netherlands Military Constabulary designated for that purpose by the Minister of Justice and the Minister of Defense are investigative officers. In addition, Article 142 CCP allots investigative powers to ‘special investigative officers’, a group which includes people designated as such by the Minister of Justice or the Board of Procurators-General⁹⁹ and investigative officers in charge of special investigative services (e.g. for environmental crimes or fiscal crimes).¹⁰⁰ All these people who are responsible for the criminal investigation on the basis of Articles 141 and 142 CCP are collectively referred to as investigative officers, as provided in Article 127 CCP.

Article 148 explicitly provides that public prosecutors are responsible for tracing criminal offenses, within the jurisdiction of the District Court for which the prosecutor is working. Articles 141, 142 and 148 CCP together determine who is responsible for the government’s task to investigate criminal offenses and to trace criminal offenders. The designation as an investigative officer gives that officer the authority to exercise the criminal investigative task. It does not give the officer in charge specific powers for pursuing this task, although these powers may again be derived from this task attribution for criminal investigation.¹⁰¹

The examining magistrate’s (sword) role in the criminal investigation primarily concerns a role as a warrant judge, considering that the *ex ante* authorization of the examining magistrate is required for the use of some investigative powers.

⁹⁷ Article 182 CCP replaces the ‘mini-investigation’ on the basis of Articles 36a-36d CCP, as a consequence of the soon to be expected entry into force of the Act on Strengthening the Position of the Examining Magistrate (*Kamerstukken I* 2010/11, 32177, no. A and *Kamerstukken II* 2009/10, 32177, no. 3).

⁹⁸ Section 2.3.1.5 will provide a brief description of these pre-trial investigative possibilities for the suspect.

⁹⁹ The Board of Procurators General [*College van procureurs-generaal*] is in command of the public prosecutor’s department and has the authority to give general and more specific directions to the public prosecutor’s department. The board consists of five members with one chairman. Corstens 2008, 119-120.

¹⁰⁰ Articles 141 and 142 CCP.

¹⁰¹ This will be dealt with in Sect. 2.2.2.1.

Also citizens can in some circumstances be allotted with an investigative task. Citizens can assist in the criminal investigation upon the request of the public prosecutor under the CCP provisions regarding special investigative techniques.¹⁰² They can be requested to act as an informant, to take part as a citizen in an infiltration action or to act in pseudo-deals or services.¹⁰³

This section will deal with the three main actors during the criminal investigation with a direct responsibility for truth-finding: the police, the PPS and the examining magistrate.

2.2.1.1 The Police

Not only the police, but also some other (specialized) services carry out the criminal law enforcement task and thus bear in practice the responsibility for the criminal investigation carried out under the supervision of the public prosecutor. The goal of the activities of these law enforcement services concerns the collection of information for criminal prosecution. The following law enforcement services can be identified: the PPS, the police (including the criminal intelligence unit (CIE)), the Royal Netherlands Military Constabulary, customs and special investigative services such as the FIOD-ECD (the Fiscal Information and Investigation Service and the Economic Investigation Service), and the AID (the General Inspectorate for agriculture). In the context of this research, attention will primarily be devoted to the PPS and the police, which for the police particularly concern the KLPD (the National Police Services Agency) and regional police forces, the criminal investigation service and the CIE.

The police in the Netherlands are organized in 25 regions, each having its own regional police force supervised by a chief of police, one national police force (KLPD) and special police officers.¹⁰⁴ The KLPD is particularly concerned with serious crime which is not restricted to one particular area. Especially for the purpose of advanced criminal investigation the KLPD has a criminal investigation service [*ationale recherche*],¹⁰⁵ which is also responsible in particular for the investigation of terrorist activities. Furthermore, the regional police forces as well as the KLPD have a criminal intelligence unit [*Criminele Inlichtingen Eenheid*] (henceforth: CIE), which collects and verifies criminal intelligence, including information from informants, and analyzes this information insofar as the information concerns serious crimes and is relevant for the tasks of the police. Criminal investigative policy choices may be founded on the analyses of the CIE, or the CIE can provide reports to the police, which can be used to initiate a criminal

¹⁰² Title Va (Article 126v-z) of the CCP.

¹⁰³ Articles 126v-126z CCP. For terrorism investigations: Articles 126zt-126zu CCP.

¹⁰⁴ Articles 21, 24, 38 and 43 Police Act 1993 [*Politiewet 1993*].

¹⁰⁵ Regeling nationale en bovenregionale recherche, *Stcrt.* 2004, 19.

investigation.¹⁰⁶ (Political) control over the police is entrusted to the Minister of Security and Justice.¹⁰⁷

Article 2 of the Police Act 1993 attributes to the police the task of the actual enforcement of the law and the maintenance of order and to provide assistance to anyone in need, while being subordinated to the competent authority and in accordance with the law as is in force.¹⁰⁸ All police officers are authorized to pursue this task anywhere in the territory of the Netherlands.¹⁰⁹ Considering this task the police also have a monopoly on using force, as provided in Article 8 of the Police Act 1993.

This police task is twofold: the first task is the maintenance of public order and offering assistance (administrative supervisory authority or administrative enforcement), in which function the police act under the supervision of the mayor.¹¹⁰ The second, law enforcement task (the enforcement of criminal law) occurs under the supervision of the public prosecutor.¹¹¹ The public prosecutor shall exert this supervisory responsibility impartially, which follows from his position as part of the ‘judiciary’ and, hence, taking into account all the interests—sword and shield—involved.¹¹² The criminal law enforcement task of the police is understood to be an *ultimum remedium*, which means that the police shall consider alternatives before turning to the use of their powers attributed for the purpose of exerting the law enforcement task.¹¹³

During the criminal investigation the investigative officers will in practice conduct the investigative activities. The police are subordinated to the supervision of the PPS, which will include the obligation to act upon the instructions of the PPS. Such instructions can also be given on a more general basis by the issuance of guidelines to direct the police in the execution of their task, for example by describing the situations where the police may offer a transaction (a settlement penalty) in order to avoid a criminal prosecution in the case of minor criminal offenses. Nevertheless, in practice the police usually operate with a high level of

¹⁰⁶ Regeling criminele inlichtingen eenheden, *Stcrt.* 2000, 198, Articles 2 and 4.

¹⁰⁷ Until 14 October 2010, the Minister of the Interior controlled the Police. See *Organisatieregeling Ministerie van Veiligheid en Justitie*, *Stcrt* 2011, no. 1003 and 1004.

¹⁰⁸ Article 2 Police Act 1993.

¹⁰⁹ Article 7 Police Act 1993.

¹¹⁰ Article 12 Police Act 1993. When the task of maintaining public order has a character which exceeds the normal tasks of the municipality the governor of the province [*Commissaris van de Koningin*] can supervise the police in their task of maintaining public order (Article 16(1) Police Act 1993). When the breach of public order has a national character, the Minister of the Interior, at present the Minister of Security and Justice, can instruct the mayor and governor as to the task of the police and can order that certain objects or facilities be guarded or made secure (Article 15a and Article 16(2) Police Act 1993).

¹¹¹ Article 13 Police Act 1993.

¹¹² See in more detail [Sects. 2.2.1.2 and 2.3.1.2](#). In addition, see for the precise understanding of the formal position of the public prosecutor as part of the judiciary [Sect. 2.1.2](#).

¹¹³ Buruma 2007, 525.

autonomy. The police do not need the permission of a public prosecutor when they want to use a criminal procedural power attributed to them to execute their task. Furthermore, the public prosecutor, the chief of police and the mayor enter into regular consultations concerning which policy should be chosen in a certain area, which implies a mutual influence on policy choices.¹¹⁴ Lastly, the PPS is largely dependent on the information provided by the police for the building of cases. In sum, this means that the police have a rather large autonomy in executing their task and using investigative powers which have been attributed to them, whilst the PPS bears the primary responsibility for the criminal investigation mainly by means of making strategic choices and prosecutorial decisions.¹¹⁵

2.2.1.2 The Public Prosecution Service (PPS)

The PPS is a hierarchical organization: the public prosecutor acts under the supervision of the Chief public prosecutor of the district, who again falls under the supervision of the Board of Procurators General [*College van procureurs-generaal*].¹¹⁶ The PPS as a whole acts under the supervision of the Minister of Security and Justice, who may give general and specific instructions (which occurs only in exceptional circumstances) to the PPS.¹¹⁷ The Minister of Security and Justice also appoints, by royal decree, the public prosecutors and procurators general. The Board of Procurators General shall provide all information to the Minister which is relevant to exercising his supervisory task.¹¹⁸ A similar obligation applies to the members of the PPS in relation to the Board of Procurators General.¹¹⁹ In that way a hierarchical system of control and supervision is realized, although a certain level of distance has also been created between the Minister of Security and Justice and the PPS—in the form of the intermediary Board of Procurators General—in order to guarantee that the PPS operates free from political pressure.¹²⁰

The PPS is further organized into 19 district public prosecutor's offices [*arrondissementsparketten*], related to the 19 district courts (courts of first instance), and one national public prosecutor's office, which is particularly responsible for the investigation and prosecution of serious crimes, such as

¹¹⁴ Article 14 Police Act 1993.

¹¹⁵ Buruma 2007, 555. See also: Krommendijk et al. 2009, 15–16. The PPS has a larger influence in more complex criminal investigations, for example by having the power to order the use of special investigative techniques. For the use of some special investigative techniques the authorization of the examining magistrate is also required. Nevertheless, the primary responsibility for the criminal investigation remains with the PPS. See on this subject in more detail [Sects. 2.2.1.2 and 2.2.1.3](#).

¹¹⁶ Articles 125, 130 and 136 Judiciary Organization Act [*Wet op de rechterlijke organisatie*], *Stb.* 1999, 195, as amended (2011). Hereafter referred to as 'RO'. The public prosecutors at the Courts of Appeal are referred to as Advocates General (Article 138 RO).

¹¹⁷ Article 127 RO.

¹¹⁸ Article 129(1) RO.

¹¹⁹ Article 129(2) RO.

¹²⁰ See e.g. Article 128 RO. In more detail: Corstens 2008, 112–115.

organized crime or crimes of a national or international character including terrorism. Furthermore, there is one specialized public prosecutor's office that focuses on e.g. fraud and environmental crimes. Lastly, there are five public prosecutor's offices [*ressortsparketten*] at the Courts of Appeal.¹²¹

The PPS is a crucial actor in the criminal investigative phase by bearing responsibility for the criminal investigation, on the basis of Article 124 of the Judiciary (Organization) Act, Article 13 Police Act and Articles 132a and 148 CCP.¹²² Article 132a CCP defines the criminal investigation and includes in that definition that the criminal investigation occurs under the supervision of the public prosecutor. Also according to Article 149 CCP, providing for the task of the public prosecutor, the public prosecutor bears the responsibility for the criminal investigation. In Article 13 Police Act it is provided that the police exert their law enforcement task under the supervision of the public prosecutor. In Article 141 the public prosecutor is indicated as a first in line law enforcement (criminal investigative) officer, although in practice only the police will act as law enforcement officers. Giving the public prosecutor this responsibility for the criminal investigation is a logical decision as it is also the public prosecutor who has the discretionary power to decide on whether to prosecute or not [*opportuïteitsbeïnsel*]. The realization of an effective prosecution policy will also depend on the choices already made in the course of the criminal investigation.¹²³

In line with the supervisory role for the criminal investigation, the public prosecutor has been given the power to order the use of coercive powers and special investigative techniques. Also the police have been attributed the discretion to use investigative powers for the purpose of fulfilling their law enforcement task, but only the public prosecutor is entrusted with the power to apply more intrusive techniques that intrude on the private lives of citizens. What powers are available during the criminal investigation and, in particular, the use of covert special investigative techniques upon the order of the public prosecutor (and for the most intrusive techniques also the authorization of the examining magistrate) will be extensively addressed in [Sect. 2.2.2](#).

The supervisory role of the PPS over the criminal investigation also has significant consequences for the further development of the proceedings, because the public prosecutor decides on the moment when materials are to be disclosed to the defense (Article 30 CCP) and on the compilation of the file that will constitute the basis for the inquiry at trial.¹²⁴ Considering this determining influence on the proceedings it is the task of the public prosecutor to seek the truth by investigating all the circumstances of the case, both incriminating and exonerating, equally. In line with the responsibility for the course of events during the criminal investigation that should be borne in an unprejudiced way, the PPS is viewed as part of the

¹²¹ Corstens 2008, 119.

¹²² A responsibility which can be derived from Article 124 RO and Articles 148 and 132a CCP.

¹²³ 't Hart 1983, 137-138.

¹²⁴ Corstens 2008, 91, 92, 247 and 248.

judicial organization in a wider sense. At the same time, the Minister of Security and Justice is politically accountable for the functioning of the PPS and, under certain conditions, has the power to give instructions to the PPS.¹²⁵ This double line of accountability, an orientation towards the judiciary and the supervision of the Minister of Security and Justice, gives the PPS a special position intended to provide public prosecutors with sufficient independence to fulfill their truth-seeking role while at the same time taking into account criminal policy interests.

2.2.1.3 The Examining Magistrate

At the time of the adoption of the CCP the preliminary judicial investigation still occupied a central place in the pre-trial phase next to the criminal investigation. The preliminary judicial investigation shall be opened once a suspicion is present and, consequently, the examining magistrate, as a judge, obtains the supervisory role over the investigative activities in the pre-trial phase.¹²⁶ The idea underpinning this intended central role for the examining magistrate was to guarantee the impartiality and independence of the pre-trial investigation.¹²⁷ However, in practice this central position of the judicial preliminary investigation has faded away,¹²⁸ partly due to a number of legislative changes reducing the role and function of the preliminary judicial investigation and, consequently, also the central role of the examining magistrate in the pre-trial phase.

A number of incidents, including widely publicized wrongful convictions, have resulted in a call to improve the balance within the pre-trial phase by enhancing the equal attention to exonerating and incriminating circumstances, which goes hand in hand with enhanced judicial control over the pre-trial phase by strengthening the position of the examining magistrate. Consequently, the adoption¹²⁹ of the Act to Strengthen the Position of the Examining Magistrate has resulted in abolishing the preliminary judicial investigation in order to strengthen the supervising role of the examining magistrate over the criminal investigation in general without connecting it to the rather obsolete structure of the preliminary judicial investigation. In this way the role of the actors in the criminal investigation have actually been repositioned: the public prosecutor directs the criminal investigation, with a supervisory role over the police, and the examining magistrate exerts judicial

¹²⁵ Simmelink en Baaijens-van Geloven 2001, 395-396. See also *Kamerstukken II* 1996/97, 25 392 no. 3, 3.

¹²⁶ Hielkema 2005, 259.

¹²⁷ Franken 2006, 267.

¹²⁸ Reijntjes already concluded in 2001 that, in fact, at that time the preliminary judicial investigation had already been abolished. However, the abolition is not yet formal. Reijntjes 2001, 297. This last step will only be taken by the entry into force of the Act on Strengthening the Position of the Examining Magistrate, *Kamerstukken I* 2010/11, 32177, no. A.

¹²⁹ On June 30, 2011 the Second Chamber of Parliament adopted the bill. On November 29, 2011 also the First Chamber adopted the bill. It can be expected that the act will enter into force shortly after this book has been finalized. See for the Bill: *Kamerstukken I* 2010/11, 32177, no. A.

control over the course of events in the criminal investigation, in particular over the legitimate use of investigative powers, over the progress of the investigation and over the realization of the duty to seek the truth in a balanced and complete manner.¹³⁰ Section 2.3.1.3 will deal in more detail with the role of the examining magistrate and his or her relation towards the other actors in the pre-trial phase, considering that the role of the examining magistrate is primarily a shield role. This section will be further confined to briefly setting out the investigative powers for which authorization by the examining magistrate is required and the investigative powers that shall be exerted by the examining magistrate personally.

The current role of the examining magistrate can primarily be described as a warrant judge or judge of freedoms, responsible for *ex ante* judicial control over the criminal investigation and in particular over the use of the most intrusive investigative methods, namely electronic surveillance (Articles 126l, 126m and 126t CCP) and the subpoena of certain stored or still to be processed personal (other than identifying) information (Articles 126nd, 126ne, 126nf, 126ud, 126ue, 126ug CCP).¹³¹ Authorization by the examining magistrate is also required for the search of homes and offices of persons acting under a privilege of non-disclosure such as lawyers and for the seizure of objects and materials (Articles 97, 110 CCP). Searches are in principle conducted by the examining magistrate in person, although in cases of urgency the public prosecutor may conduct the search upon the authorization of the examining magistrate. The examining magistrate also has the power to seize objects and materials (Article 104 CCP).

The examining magistrate may, furthermore, take investigative steps at the request of the public prosecutor or at the request of the defense (Articles 181 and 182 CCP). When the examining magistrate considers additional investigative steps to be necessary for the completeness of the investigation, he or she may also apply investigative powers *ex officio*. The use of investigative powers at the request of the public prosecutor, the defense or *ex officio* may concern, for example, the hearing of witnesses. This hearing of witnesses may also concern the application of special procedures for hearing shielded witnesses (see on this Sect. 3.4.2, considering that this special procedure has been introduced in order to further cooperation between the intelligence and law enforcement communities as part of the Dutch counterterrorism strategy).¹³²

¹³⁰ *Kamerstukken II* 2009/10, 32177, no. 3, 1-2 and 10. See on the recent Act to Strengthen the Position of the Examining Magistrate also Van der Meij 2010B and Mevis 2009B.

¹³¹ In addition, the examining magistrate has, as a judge, an independent general supervisory role over the course of events pre-trial. This ‘shield’ role will be dealt with in Sect. 2.3.1.3.

¹³² In addition, the examining magistrate bears the important responsibility for determining the legitimacy of pre-trial detention (remanding in police custody [*inverzekeringstelling*] on the order of the public prosecutor or deputy public prosecutor for a period not exceeding 3 days, with the possibility of an extension for another 3 days; Articles 57, 58 and 59a CCP) and has the power to order, upon the request of the public prosecutor, a further extension of pre-trial detention for a period of 14 days [*bewaring*] (Article 63 CCP).

Within the scope of the criminal investigation ‘pre-arrest’, the task of the examining magistrate is primarily one of a warrant judge, where his authorization is required before some investigative powers may be used. The hearing of witnesses at the request of the public prosecutor may in exceptional circumstances already occur before the suspect has been found and/or is aware of the investigation against him or her. In addition, the examining magistrate has an overall controlling function over the criminal investigation with regard to its progress and completeness. This latter function will be addressed in more detail in [Sect. 2.3.1.3](#).

2.2.1.4 The AIVD (General Intelligence and Security Service)

Although the General Intelligence and Security Service [*Algemene Inlichtingen- en Veiligheidsdienst*] (henceforth: AIVD) cannot be considered as an actor in the criminal investigation, it is included in this section as a relevant actor, because its activities do influence the sword ability of the police and PPS as a consequence of the possibility to send official reports to the police or PPS and on which basis the police and PPS may initiate criminal investigative action or change the focus of an ongoing criminal investigation.

The intelligence services include the AIVD and the MIVD [*Militaire Inlichtingen en Veiligheidsdienst; Military Intelligence and Security Service*]. Furthermore, all regional police forces have a regional intelligence service (RID), which operate as the regional continuation of the AIVD.¹³³ Since 2002 the tasks of the AIVD have explicitly been defined in law by means of the Intelligence and Security Services Act of 2002 [*Wet op de inlichtingen- en veiligheidsdiensten*] (hereinafter: WIV 2002).¹³⁴ With the adoption of this Act, the tasks of the intelligence services have been defined in an Act of Parliament for the first time. The WIV of 2002 enumerates five tasks of the AIVD:

“(a) conducting investigations regarding organizations that, and persons who, because of the objectives they pursue, or through their activities give cause for serious suspicion that they are a danger to the continued existence of the democratic legal system, or to the security or other vital interests of the state; (b) conducting security clearance investigations as referred to in the Security Investigations Act; (c) promoting measures for the protection of the interests referred to under a, including measures for the protection of information that is to remain secret for reasons of national security, and information pertaining to those parts of the public service and business community that in the opinion of the relevant Ministers are of vital importance for the continued existence of the social order; (d) conducting investigations regarding other countries concerning subjects designated by the Prime Minister, Minister of General Affairs, in accordance with the relevant

¹³³ Muller 2007, 178-179.

¹³⁴ *Stb.* 2002, 148.

Ministers; (e) drawing up threat and risk assessments at the joint request of the Minister of the Interior and Kingdom Relations and the Minister of Justice for the benefit of the protection of [certain in law specified persons].”¹³⁵

The main task of the AIVD concerns the collection of intelligence for the purpose of protecting the democratic legal order and security or other vital interests of the state (in the following collectively summarized as the protection of national security).¹³⁶ Through the collection of intelligence and the distribution of information (in the form of reports or notes) to other government agencies or private organizations, measures can be taken in order to avert a threat. Most relevant in the context of this research is the situation where the AIVD has obtained intelligence on a certain threat to national security and sends an official report regarding information on this threat to law enforcement services on which basis the police (in cooperation with the PPS) can subsequently take action by either directly arresting persons in order to avert the threat or by initiating a criminal investigation for the purpose of collecting further information that can be used in a criminal prosecution.¹³⁷ This possibility of transferring information to law enforcement services will be further elaborated in Sect. 2.2.2.4.2.

The AIVD resorts under the responsibility of the Minister of the Interior.¹³⁸ In this way the intelligence community is also separated with regard to their political accountability from the law enforcement services, which act under the authority of the Minister of Security and Justice. This separation between the intelligence community and the law enforcement community is established because of shield considerations, for which reason this subject will be further elaborated in Sect. 2.3.2.2.3. The position of the RIDs is slightly different as the RIDs have both an ‘AIVD task’, acting under the authority of the AIVD, and a task with regard to the enforcement of public order under the responsibility of the mayor.¹³⁹

¹³⁵ Article 6 WIV 2002 (as amended by *Stb.* 2006, 574, adding the task under e to Article 6). Official translation of the WIV 2002 available at: <https://www.aivd.nl/english/aivd/the-intelligence-and/> (accessed February 18, 2011). The five tasks of the AIVD are summarized, maybe more clearly, on their website as follows: (1) To investigate people and organizations reasonably suspected of representing a serious danger to the democratic legal order, national security or to other important interests of the Dutch State; (2) To screen candidates for the so-called “positions involving confidentiality” (this task is provided for under separate legislation, the Security Screening Act or *Wvo*); (3) To support the institutions responsible for maintaining the security of those sections of the national infrastructure, in both the public and the private sectors, which are vital to maintaining the fabric of Dutch society; (4) To investigate other countries in respect of activities jointly designated by the Prime Minister, the Minister of the Interior and the Minister of Defence; (5) As part of the national Safety and Security System, to supply risk and threat analyses concerning property, services and individuals.”

¹³⁶ Muller 2007, 171.

¹³⁷ The transfer of information from the AIVD to law enforcement services is dealt with in detail in Sect. 2.2.2.4.2.

¹³⁸ See Article 1 WIV 2002. The Minister of Defense is responsible for the Military Intelligence and Security Service.

¹³⁹ Muller 2007, 179-180.

2.2.2 *The Powers Available for Truth-Finding in the Criminal Investigation*

In the previous section the actors that have been designated with the task of truth-finding during the criminal investigation have been described. As a consequence of the principle of legality (see [Sect. 2.1.3.1](#)), these actors may only conduct investigative activities if the powers used to that end are provided in the law. Hence, this section will deal with the different bases in law from which these actors may derive the power to conduct investigative activities and apply specific far-reaching investigative techniques.

With regard to the specific basis in law required for using investigative powers, the explanatory memorandum of the CCP is rather vague by providing that ‘the police and prosecution must be given all those means that they need for investigating crimes and culprits in order to gather the available evidence as soon as possible and take all measures required for bringing the accused as quickly as possible before a judge. The authorities that are attributed the task of investigating and prosecuting must be able to act quickly and decisively, being able to do what is required under the specific circumstances of a case and shall not be hindered by regulations which are too stringent.’¹⁴⁰

Until 2000 the police and PPS had a wide discretion in using investigative powers, which could be derived from the provision formulating their task as investigative officers. The growing awareness in the 1990s of the importance of protecting citizens against the unfettered investigative power of the state interfering with their personal freedom and the simultaneously growing arsenal of smart investigative techniques resulted in a more specific regulation of investigative powers, as adopted by the Act of 27 May 1999 (entering into force on 1 February 2000).¹⁴¹ Consequently, the Dutch CCP currently provides not only general task descriptions for investigative officers, but also for codified provisions that designate specific investigative powers. Notwithstanding the fact that this act intended to increase the protection of the right to respect for private life where the police and PPS sought the use of intrusive special investigative techniques, the Act has also broadened the scope of the criminal investigation to include also proactive investigation. Before 2000 the criminal investigation was understood to be limited to the situation where a reasonable suspicion could be established; the government’s use of criminal procedural law was considered to be only justified in the situation where a reasonable suspicion of a crime having been committed could be established. Since 2000 the criminal investigation includes also proactive investigative activities, lacking the establishment of a reasonable suspicion of a *committed* crime. Currently, the criminal investigation covers *all* investigative

¹⁴⁰ Lindenberg 2002, 424 (MvT 16).

¹⁴¹ Stb. 1999, 245, Stb. 2000, 32.

activities conducted for the purpose of making prosecutorial decisions under the supervision of the public prosecutor.

This section will continue to describe the investigative powers that can be used to contribute to the goal of the criminal investigation: the collection of information in order to make prosecutorial decisions.¹⁴² For this purpose the different bases in law will be dealt with separately, whilst in describing these bases in the law the historical development will be taken into account, including the interpretation of the term ‘criminal investigation’ in the Netherlands over the years. There are four different bases from which the power to use investigative powers can be derived for the purpose of collecting information that can be used in criminal proceedings. These bases differ in accordance with the character of the investigative power as a consequence of the regulatory effect of the right to respect for private life and the principle of legality (see in more detail [Sects. 2.1.3.1, 2.1.3.2 and 2.3.2.1](#)).

In the first place, Article 2 of the Police Act of 1993¹⁴³ will be dealt with, which provides for the general task of the police. The description of the law enforcement task of the police is understood to provide the basis in law to conduct certain investigative activities that to a limited extent interfere with private life ([Sect. 2.2.2.1](#)).

Secondly, more specific provisions in the CCP or in special criminal statutes provide for the basis for using investigative powers that seriously interfere with private life, such as the use of coercive methods¹⁴⁴ and investigative methods such as the searching of homes, electronic surveillance and infiltration. In general, as a minimum, the presence of a reasonable suspicion is required before these methods can be applied.¹⁴⁵ The covert investigative methods that are applied pre-arrest, and, hence, the methods which are relevant for this research are collectively referred to as special investigative techniques (or SIT). [Section 2.2.2.2](#) deals with these SIT by addressing the Act that has created the specific legal bases for SIT (the Act on SIT of 27 May 1999) and the phase of the criminal investigation in which these SIT can be used (the full criminal investigation, that can either be reactive or also proactive). Furthermore, investigative officers may derive the power to use specific investigative methods from some special statutes, where the investigation concerns the offenses criminalized in those statutes, such as the Act on Weapons and Ammunition (Article 49-52), the Act on Economic Offenses (Article 17-26) and the Opium Act (Article 9).

In the third place, the CCP provides for investigative powers in the context of a preliminary investigation, which is only allowed in preparation for the more

¹⁴² Compare Article 132a CCP.

¹⁴³ Police Act 1993.

¹⁴⁴ Coercive methods are understood to concern freedom-restricting methods, such as arrest and pre-trial detention.

¹⁴⁵ See for example Article 54 CCP for the coercive method of arrest and Article 126g for the special investigative technique of systematic observation. The most significant and general requirement before coercive methods or special investigative techniques can be applied against someone concerns the establishment of a reasonable suspicion as to Article 27(1) CCP.

complex (full) investigation of organized crime (Sect. 2.2.2.3). This preliminary investigation is an investigative phase separated from the full criminal investigation in the CCP, for which reason it is also dealt with as a separate basis for investigative activities, to be distinguished from the several provisions for using SIT in the context of the (full) criminal investigation. During the preliminary investigation, investigative activities can be conducted that aim to gather sufficient information to start a full criminal investigation.¹⁴⁶ These investigative techniques have a less intrusive character in comparison with those available in the full criminal investigation, such as the search of police databases.¹⁴⁷ Of course, the information collected during the preliminary investigation will equally become part of the criminal investigation, for which reason the investigative power of the preliminary investigation adds up to the sword capacity of the criminal investigation.

Lastly, as already mentioned in Sect. 2.2.1.4, information obtained by the AIVD can be shared with the PPS by means of an official report and can, consequently, result in criminal investigative steps and become part of the information produced in the criminal investigative phase and, hence, of the dossier. The information received from the AIVD may be used to serve the goal of the criminal investigation (collecting information to make prosecutorial decisions), for which reason it is dealt with as a separate basis in this section.

2.2.2.1 Article 2 Police Act 1993

As already briefly explained above, the police may conduct investigative activities in order to fulfill their general policing task as provided in Article 2 Police Act 1993. According to Article 2 it is the task of the police to pursue the actual enforcement of law, to maintain order and to provide assistance to anyone in need, while being subordinated to the competent authority and in accordance with the law as is in force. This includes the police's law enforcement task, for which purpose the police shall investigate and prevent criminal offenses.¹⁴⁸ The relevance of Article 2 Police Act 1993 as a legal basis for investigative powers within the complete arsenal of investigative powers which are available in the criminal investigation follows from the interpretation of Article 2 over the years up until the interpretation which has been currently adopted. Important for this interpretation is the divisibility of the general police task into two types: the law enforcement task and the task of administrative enforcement, which concerns the maintenance of legal order, including the prevention of crime. This distinction made within the policing task can also be found in the organization of the supervision of either task—by the public prosecutor or the mayor—as well as in its regulation.¹⁴⁹ The

¹⁴⁶ Article 126gg CCP.

¹⁴⁷ Article 126hh CCP.

¹⁴⁸ Van Zuijlen 2008, 116-117.

¹⁴⁹ Articles 12 and 13 Police Act 1993 (supervision).

law enforcement task is regulated in criminal procedural law, whereas administrative enforcement is regulated in administrative law.¹⁵⁰

Criminal investigation and the police's task to conduct criminal investigative activities were initially (mainly before the entry into force of the Act on Special Investigative Techniques in 2000¹⁵¹) distinguished from the administrative supervisory task of the police on the basis of the presence of a reasonable suspicion: criminal investigation concerns investigation on the basis of a reasonable suspicion, while the controlling task of the police concerns all other forms of investigation and control. This distinction with a 'reasonable suspicion' as the dividing line resulted in a 'limited interpretation of the criminal investigation' regulated by criminal procedural law. However, in practice, criminal investigation and administrative supervision cannot be strictly separated as both activities often overlap.¹⁵² The powers for administrative supervision and for criminal investigation are often delegated to the same officials, for which reason the demarcation line between administrative supervision and criminal investigation is often difficult to recognize. This is especially apparent when the administrative supervisory authorities are delegated with regard to a special Act (such as drugs) and the activities lead to the establishment of a reasonable suspicion of a criminal offense. Using powers for other purposes than attributed constitutes a *détournement de pouvoir* (an abuse of power).¹⁵³ However, most investigative officers will be attributed with the power to use investigative methods for both purposes in order to avoid problems as just mentioned.¹⁵⁴

Also the Supreme Court upheld a limited interpretation of the criminal investigation in the so-called '*Shadow judgments*' (1986)¹⁵⁵ and in the '*Zwolsman*' case (1995)¹⁵⁶ by determining that the criminal investigation only entails the investigation aimed at the clarification of a reasonable suspicion that a crime has been committed or is being committed, from which proactive activities are excluded. The criminal investigation in the limited sense was at that time understood to entail only the activities regulated in criminal procedural law, which concerned activities that could be conducted upon the establishment of a reasonable suspicion that a crime has been committed. Nevertheless, in the *Shadow judgments* and in the *Zwolsman* case it was also argued that the criminal investigation can be preceded by a proactive phase in which law enforcement officers are entitled to use

¹⁵⁰ For the regulation of the administrative task of the police, see: Title 5.2 of the General Administrative Law Act [*Algemene wet bestuursrecht*]. Stb 1992, 315 (as amended in 2011).

¹⁵¹ February 1, 2000, Stb. 1999, 245 and Stb. 2000, 32. The implications of this Act on Special Investigative Techniques will be extensively dealt with in [Sect. 2.2.2.2.1](#).

¹⁵² Elzinga et al. 1995, 38-42.

¹⁵³ See [Sect. 2.1.3.4.2](#).

¹⁵⁴ The distinction between investigation for the purpose of administrative supervision and for the purpose of criminal investigation, and the overlap between these two functions, will be dealt with more extensively in [Sect. 2.3.2.2.2](#).

¹⁵⁵ HR 14 October 1986, *NJ* 1987, 564 and HR 14 October 1986, *NJ* 1988, 511, ann. ThWvV.

¹⁵⁶ HR 19 December 1995, *NJ* 1996, 249, ann. Sch.

investigative powers on the basis of Article 2 (at that time Article 28) of the Police Act 1993. On the basis of Article 2 of the Police Act of 1993, in combination with Article 141 or 142 CCP, which gives police officers the task of investigating criminal offenses and thus determines who may use the criminal investigative powers derived from Article 2 Police Act 1993, police officers can legitimately conduct these proactive investigative activities.¹⁵⁷

The limited interpretation of the scope of the criminal investigation was already questioned by the Parliamentary Inquiry Commission (the Van Traa Commission), which was established in December 1994 in order to investigate the use of and the control on investigative powers within the Netherlands. In its report the Van Traa Commission endorsed the fact that the criminal investigation in practice includes phases in which a reasonable suspicion cannot be established. As demonstrated by the case of *Zwolsman*, proactive investigative activities were being applied in practice and they lacked any regulation by criminal procedural law.¹⁵⁸ The acceptance of these proactive investigative activities in fact pointed to a gap in the law, considering that regulation in the CCP is desirable because also these proactive investigative activities aim to trace criminal offenses and to interfere with the private lives of those people involved. In order to offer a solution to this undesirable situation, the Van Traa Commission had proposed a definition of criminal investigation, which included those situations in which a reasonable suspicion cannot yet be established.¹⁵⁹

Both the report of the Parliamentary Inquiry Commission (1996) and the Supreme Court's decision in *Zwolsman* (1995) can be understood as a call for the legislature to create new legislation providing for a basis in the CCP for investigative methods that (seriously) interfere with privacy rights, which can both be applied in reaction to a crime which has been committed or proactively.¹⁶⁰ The Act of 27 May 1999 on special investigative techniques amended the CCP in order to precisely regulate the use of SIT.¹⁶¹ This Act entered into force on 1 February 2000.¹⁶² For the first time the Act also provided for a definition of criminal investigation in Article 132a CCP. According to this definition, the criminal investigation occurs under the supervision of the public prosecutor and commences when there is a reasonable suspicion that a crime has been committed or when there is a reasonable suspicion that crimes in an organized context are being

¹⁵⁷ HR 19 December 1995, *NJ* 1996, 249, ann. Sch., para 6.4.5, see also the annotation by Sch. para 3 and 4. HR 14 October 1986, *NJ* 1988, 511, ann. ThWvW, para 6.2. See also Fokkens and Kirkels-Vrijman 2009, 109.

¹⁵⁸ HR 19 December 1995, *NJ* 1996, 249 (*Zwolsman*), para 6.4.4 and 6.4.5 and HR 14 October 1986, *NJ* 1987, 564 para 7.3 and HR 14 October, *NJ* 1988, 511, ann. ThWvV para 6.2 (*Shadow Judgments*).

¹⁵⁹ Rapport van de Parlementaire Enquêtecommissie Opsporingsmethoden 1996, 455.

¹⁶⁰ Rapport van de Parlementaire Enquêtecommissie Opsporingsmethoden 1996, 432-437 and HR 19 December 1995, *NJ* 1996, 249, para 6.4.4.

¹⁶¹ *Stb.* 1999, 245.

¹⁶² *Stb.* 2000, 32.

planned or committed while these crimes result in a serious infringement of the legal order.¹⁶³ The latter threshold aims to include proactive investigative activities. The purpose of the criminal investigation must, furthermore, be to ‘make prosecutorial decisions’, which generally means any decision by the public prosecutor in relation to criminal offenses (e.g. the decision as to whether or not to prosecute as well as the decision to arrest a suspect) and, hence, that the purpose of the investigation shall be the collection of information which is relevant for truth-finding regarding criminal offenses. As a consequence of this definition of the criminal investigation, the relevant investigative activities, which were already used in practice and resulted in a serious interference with private life, are by means of the Act of 1999 also brought within the regulatory context of the criminal procedural law.¹⁶⁴

As a consequence of the Act on SIT of 1999 and, especially, since the Act to Broaden the Possibilities to Investigate Terrorist Crimes of 2006 (henceforth: the Act on the Criminal Investigation of Terrorist Crimes), the limited interpretation of criminal investigation and the commensurate distinction which is made between criminal investigation and administrative supervision on the basis of the presence of a reasonable suspicion is no longer valid. According to the definition of criminal investigation provided in Article 132a CCP, all police activities conducted for the purpose of making prosecutorial decisions under the responsibility of the public prosecutor concern criminal investigative activities.¹⁶⁵ Hence, the activities of the police belonging to their law enforcement task as included in Article 2 Police Act 1993 concern criminal investigative activities in the context of the criminal investigation phase defined in Article 132a CCP. According to this definition, the two distinguishing circumstances that separate the criminal investigation from administrative supervision are, firstly, that the public prosecutor supervises the police activities and, secondly, that investigative activities shall result in making prosecutorial decisions.¹⁶⁶ Therefore, the term criminal investigation refers to all investigative activities that meet this definition, which thus concerns the law enforcement task of the police regardless of the specific legal basis in law for using investigating powers for exerting the police’s law enforcement task.

Nevertheless, the previous distinction which was made between investigative activities requiring a specific legal basis and those activities that can be conducted on the basis of Article 2 Police Act 1993 in the *Zwolsman* case of 1995 is still valid as a consequence of the right to respect for private life as guaranteed in Article 8 ECHR and Article 10 Constitution and of the principle of legality as laid down in

¹⁶³ This definition was in place until 2007. The Act of 2006 to Broaden the Possibilities to Investigate and Prosecute Terrorist Crimes (Act on the Criminal Investigation of Terrorist Crimes) amended Article 132a CCP by eliminating the threshold of a reasonable suspicion or a reasonable suspicion that crimes are being planned or committed in an organized context from the definition. See on the current demarcation of the criminal investigation phase [Sect. 2.3.2.2](#).

¹⁶⁴ *Kamerstukken II* 1997/98, 25 403, no. 7, 17.

¹⁶⁵ As adopted by the Act of 20 November 2006, *Stb.* 2006, 580.

¹⁶⁶ This subject will be dealt with in more detail in [Sect. 2.3.2.2.1](#).

Article 1 CCP. The Act on SIT of 1999 has provided legal bases for the more intrusive investigative techniques (Title IVA and Title V CCP; Articles 126g-126ui CCP) that can be conducted in the context of a criminal investigation.¹⁶⁷ Article 2 of the Police Act 1993 still concerns the legal basis for those investigative activities of law enforcement officers (under Articles 141 or 142 CCP) within the criminal investigation that do not, or only to a limit extent, interfere with fundamental rights and are not otherwise regulated.¹⁶⁸

Case law has further defined which specific activities may be conducted on the basis of the general task description of Article 2 Police Act 1993. Especially the Supreme Court's decision in *Zwolsman* still functions as the guideline to determine which investigative activities can be based upon Article 2 of the Police Act 1993 and which activities must be based upon a more specific legal basis, or, in the absence of such a provision, are in fact prohibited. In *Zwolsman* it was explicitly determined that Article 2 of the Police Act 1993 is insufficient for functioning as a basis for using investigative powers that interfere with privacy rights, because a more precise legal basis is required to comply with the requirements of Article 8 ECHR, Article 10 of the Constitution and the principle of legality under Article 1 CCP.¹⁶⁹

Referring to the *Zwolsman* decision it has been decided, for example, that simple observation concerns only a limited interference with privacy rights, and Article 2 of the Police Act 1993 can thus function as the basis for this authority. Recently, the Supreme Court has accepted the use of a heat sensor on the basis of Article 2 Police Act 1993, because the 'heat image' obtained through the sensor only results in a limited interference with privacy rights.¹⁷⁰ However, when the observation has a systematic character, which depends on the frequency, the duration, the intensity, the specific location observed, the manner of observing and the level of the consequential interferences,¹⁷¹ the basis under Article 2 is unsatisfactory. Also the purpose of the observation and the specific activities observed shall be taken into account as relevant elements for the intrusiveness of the interference with private life.¹⁷² What matters, for example, is whether the observation took place in public or in a place where someone can expect to be able to rely on privacy, such as the observation of someone at his or her home.¹⁷³ Intrusive techniques for which, for instance, places that are exclusively protected

¹⁶⁷ See the subsequent section for the legal bases of special investigative techniques.

¹⁶⁸ Compare: Fokkens and Kirkels-Vrijman 2009, 123.

¹⁶⁹ HR 19 December 1995, *NJ* 1996, 249, para 6.4.4 and 6.4.5.

¹⁷⁰ HR 20 January 2009, *NJ* 2009, 225, ann. Borgers, see annotation para 7.

¹⁷¹ For example, HR 5 June 2001, *NJ* 2001, 518, para 1.4 and 4.3 and HR 29 March 2005, *LJN* AS27527, para 3.1.

¹⁷² HR 25 January 2000, *NJ* 2000, 279, para 3.5 (concerning observations of business premises for the purpose of determining whether the conditions for a particular permit were being observed) and HR 19 December 1995, *NJ* 1996, 249, para 9.7, 9.8 and 9.9.

¹⁷³ HR 14 October 1986, *NJ* 1988, 511, para 6.3.

(such as private homes¹⁷⁴) have to be entered or searched, as well as techniques that violate the confidentiality of mail and telephone communications, require an explicit basis in law for using the technique along with clear procedural conditions. Camera surveillance in public places does not infringe someone's privacy rights, because the observation does not concern a situation in which someone can have a reasonable expectation of privacy.¹⁷⁵ On the other hand, it has been prohibited to enter homes for the purpose of observation, for example in order to install a technical device, whilst the observation of a person at his or her home from the outside is not precluded as long as the observations can be made without a technical device such as a camera or are restricted to the activities that take place outside the house, for example, registering who enters and leaves the house.¹⁷⁶ The Court of Appeal of The Hague has also accepted the requesting of a suspect's IP address from a third person on the basis of Article 2 Police Act 1993.¹⁷⁷ Furthermore, the seriousness of the crimes involved can play a role in deciding whether or not Article 2 suffices as the basis for the investigative authority. With the application of the principle of proportionality the interest of investigating a serious offense is balanced against the interest of the person whose privacy is intruded for the purpose of the investigation, resulting in less strict standards for the investigation of serious crimes. The seriousness does not only entail the nature of the crime itself, but also the circumstances under which it is committed and a possible concurrence with other crimes.¹⁷⁸ The seriousness of the crime is then a factor in deciding on the proportionality of the use of the investigative power, which may also be taken into account for determining whether Article 2 Police Act 1993 is, in a particular situation, a sufficient basis for an investigative power.

¹⁷⁴ Private homes are considered to be places where people have a pre-eminent right to freedom and respect for their private life. This is also explicitly stated in Article 8 ECHR, Article 17 ICCPR, as well as protected by Article 138 and 370 Penal Code and Article 12 Constitution. The ECHR has extended the interpretation of the terms "private life" and "home" under Article 8 ECHR to include certain professional or business activities or premises. ECHR 16 December 1992, App. no. 13710/88 (*Niemietz v. Germany*), para 29.

¹⁷⁵ HR 20 April 2004, *NJ* 2004, 525, para 3.3.

¹⁷⁶ *Kamerstukken II* 1996/97, 25 403, no. 3, 70-71. And: HR 29 March 2005, *LJN* AS27527, para 3.2.

¹⁷⁷ Gerechtshof 's-Gravenhage 15 November 2002, *NJ* 2003, 23, para 3.

¹⁷⁸ HR 12 February 2002, *NJ* 2002, 301, para 3.4 and HR 29 March 2005, *LJN* AS27527, para 3.1 and 3.3. See in this regard also [Sect. 2.3.2.3](#) concerning the threshold of a reasonable suspicion. In balancing the interests involved for adopting a threshold of application for SIT, the seriousness of the crime is also an important factor which has to be considered.

2.2.2.2 Investigative Techniques with a Specific Basis in the Law

2.2.2.2.1 The Act on Special Investigative Techniques of 1999

The Act of 27 May 1999,¹⁷⁹ which entered into force on 1 February 2000,¹⁸⁰ amended the CCP in order to regulate the use of certain far-reaching investigative powers. This Act has adopted a definition of the criminal investigation that demarcates the criminal investigation as a phase in which exclusively specific far-reaching investigative powers may be used. As explained in the previous section, currently—in particular since the adoption of the Act on the Criminal Investigation of Terrorist Crimes of 2006¹⁸¹—the criminal investigation is not limited to the conditions under which also far-reaching investigative techniques can be applied. The criminal investigation is now the phase which covers all investigative activities (including those based on Article 2 Police Act 1993) for the purpose of truth-finding in criminal law. However, the use of far-reaching SIT is still regulated under more precise conditions that were previously also related to the phase of the criminal investigation.

This section will describe the system adopted for the use of SIT within the criminal investigation by the Act of 27 May 1999, by focusing on the basis for using SIT created by this Act. The goal of the adoption of this Act has been to improve the transparency and, on that basis, the internal and external controllability of criminal investigations. Considering this goal, the regulation in the CCP seems primarily to serve a shield role. Nevertheless, the created bases in law to use special investigative techniques also concern the legitimization for using far-reaching investigative techniques in order to enhance the investigative capacity of the police and PPS. Hence, this section will address the nature and scope of the investigative activities that can be conducted with the help of SIT as a consequence of the Act of 27 May 1999. The Act has resulted in a different approach to the investigative possibilities with the help of SIT for ordinary crime (henceforth: classical investigation¹⁸²) and for organized crime (organized crime investigation). This section will address the scope and nature of these two investigative domains separately. The restraints adopted by this Act on SIT and the shield function served by these restraints will, for each category, be extensively dealt with in [Sect. 2.3.2.3.2](#). Since the entry into force (2007) of the Act on the Criminal Investigation of Terrorist Crimes, ‘terrorist crimes’ constitute a third category of investigation with its own set of regulations. This category will be dealt with in the next chapter, as part of the counterterrorism measures that have enabled anticipative criminal investigations in the Netherlands.

The same techniques are available in the classical investigation and in the organized crime investigation. These techniques concern: systematic observation

¹⁷⁹ *Stb.* 1999, 245.

¹⁸⁰ *Stb.* 2000, 32.

¹⁸¹ *Stb.* 2006, 580.

¹⁸² Compare Corstens 2008, 257.

(Articles 126g and 126o CCP); infiltration (Articles 126h and 126p CCP); pseudo-dealing or serving (Articles 126i and 126q CCP); the systematic gaining of information by using informants (Articles 126j and 126qa CCP); the entering of a private place other than homes (Articles 126k and 126r CCP); the interception of private communications (in particular: with the help of a technical device, Articles 126l and 126s CCP; wiretapping and the interception of electronic communications, Articles 126la-126nb and 126t-126ub CCP); and the ordering of stored information (stored or recorded identifying information, Articles 126nc and 126uc; stored or recorded other than identifying information, Articles 126nd and 126ud; information received after the order has been issued, Articles 126ne and 126ue; stored or recorded information that concerns information regarding one's religion, race, political views, health, sex life or membership of a labor union, Articles 126nf and 126uf CCP; and, the information meant in the Articles 126nc-126ne and 126uc-126ue requested from an electronic network service provider, Articles 126ng and 126ug CCP). Some of these techniques have a more intrusive character than others, for which reason one of the enumerated techniques is generally available to law enforcement officers,¹⁸³ whereas most of the others are only available upon the order of the public prosecutor¹⁸⁴ or even require additional authorization by an examining magistrate.¹⁸⁵ The specific additional conditions for using SIT will be dealt with in [Sect. 2.3.2.3.2.5](#).¹⁸⁶

2.2.2.2.1.1 *Classical Investigation*

The classical investigation starts with the finding of a circumstance which makes it clear that a crime has been committed or may have been committed (either a notification or the discovery of evidence of a (possible) crime). This renders the classical investigation in principle a reactive form of criminal investigation, whereas it is not required that the suspect has already been found. The terms reactive and proactive are here understood in a similar fashion as is traditionally understood in Dutch criminal procedural law by referring to the triggering moment of the criminal investigation. A reactive investigation concerns an investigation for the purpose of clarifying a committed crime where a reasonable suspicion that a crime has been committed¹⁸⁷ is

¹⁸³ Ordering of identifying information.

¹⁸⁴ Systematic observation, infiltration, pseudo-dealing or serving, systematic gaining of information, and entering private places.

¹⁸⁵ Interception of private communications and ordering (personal) information other than identifying information.

¹⁸⁶ For more information on these specific special investigative techniques, see Buruma 2001 and Corstens 2008, 441-471.

¹⁸⁷ The requirement of 'suspicion' is defined in Article 27(1) CCP. According to Article 27(1) CCP, a person can be considered to be a suspect, before the prosecution has been initiated, when a reasonable suspicion to believe that he or she is guilty of having committed a criminal offense can be derived from the facts or circumstances. The importance and influence of the central position of this definition of a suspect as a threshold for using SIT will be dealt with in more detail in [Sect. 2.3.2.3](#).

present, whereas a proactive investigation refers to criminal investigative activities before there is a reasonable suspicion that a crime has been committed.¹⁸⁸

Provided that a suspicion as defined in Article 27(1) CCP is required, and thus a suspicion that a crime has been committed, proactive application, in the procedural sense, is not possible within the classical investigative domain. Nevertheless, proactive investigative goals can be pursued also in the classical investigation, because of the possibility to investigate, on the basis of the threshold which is applicable under Title IVa, the suspected fulfillment of the provisions criminalizing acts of preparation (Article 46 Penal Code and Article 10a Drugs Act), conspiracy to commit certain crimes (Articles 80, 96, 103, 114b, 120b, 122, 176b, 282c, 289a, 304b, 415b Penal Code) and participation in a criminal organization (Article 140 Penal Code).¹⁸⁹ These acts are crimes, although they often concern, at the same time, the planning of the ‘full’ crimes. Hence, investigations upon a reasonable suspicion of these crimes are, according to the law, reactive and not proactive, although in practice these investigations primarily serve a proactive goal. The investigation will in the first place be limited to clarifying a reasonable suspicion of—for instance—criminal preparation, but does not have to stop if other crimes are simultaneously discovered. As a consequence, these reactive investigations provide the possibility to act for proactive or preventive purposes with regard to other—and more serious—crimes. The Supreme Court has affirmed this practice: ‘it is not precluded that an authorization, in this case for infiltration, in the classical investigation is used for the discovery of criminal offenses which are committed after the authorization of the order.’¹⁹⁰ This interpretation thus allows that an investigation upon a reasonable suspicion of a specifically indicated crime is not limited to that crime but can be simultaneously extended to other discovered crimes.

2.2.2.2.1.2 *Organized Crime Investigation*

Title V of the CCP provides for the SIT which are available in the investigation of organized crime. These concern the same techniques as are available in the classical investigation. However, the Title dealing with the special investigative techniques which are available in the organized crime investigation differs from the Title dealing with SIT in the classical investigation, because the investigation is not limited to a reaction to the presence of a reasonable suspicion of a committed crime. Instead, the main requirement that has to be met before SIT can be used in organized crime investigations concerns: ‘a reasonable suspicion that crimes are being planned or committed in an organized context, which crimes result in a serious infringement of the legal order considering their nature or relation with other crimes and for which crimes pre-trial detention can be imposed as to the

¹⁸⁸ Compare Corstens 2008, 257-258 and 269. Corstens identifies proactive investigation as ‘early detection’ [*vroege sporing*].

¹⁸⁹ See in more detail: Krommendijk et al. 2009, 119-123, Sikkema 2008, para 4.10, and Van Sliedregt 2006, 9.

¹⁹⁰ HR 7 October 2003, *NJ* 2004, 118, para 3.3.

law.’ This means that contrary to classical investigations, the proactive use of SIT is permitted, considering that the reasonable suspicion is not limited to committed crimes, but covers also future criminality.

The adoption of the Act on SIT of 27 May 1999 was primarily a consequence of the ‘crisis in the investigation’ as reported by the Van Traa Commission due to a discrepancy between investigative practice and its regulation in the CCP.¹⁹¹ The traditional reactive form of criminal investigation was unsuitable for the investigation of organized crime, which concerns a form of criminality that has increased in particular in the 1980s. A strategy of going after separate crimes committed by a criminal organization was unable to stop the criminal organization from planning and committing new offenses. As a consequence, in practice SIT were used to obtain information on the structure and members of a criminal organization and the nature of the criminal offenses committed by this organization. The existence of a proactive investigative practice in the absence of explicit regulation in the CCP was also confirmed by the Supreme Court in the *Zwolsman* case (1995)¹⁹² and by the Van Traa Parliamentary Inquiry Commission.¹⁹³

It was generally acknowledged that the investigation of organized crime calls for a different approach than investigating conventional crime, because of the complexity and serious nature of the criminal activities. The criminal activities of such an organization are not limited to one crime and one suspect. A proactive approach targeting the organization as a whole is required. Hence, for effectively confronting organized crime, it was deemed necessary to adopt a standard for the use of SIT that is different from the standard applied to classical investigations.¹⁹⁴ The adopted threshold for organized crime investigations meets this goal by permitting the use of SIT in relation to multiple people and multiple criminal offenses in order to investigate the planning and committing of serious crimes in the context of a criminal organization. According to the explanatory memorandum of the Act on SIT, the investigation of organized crime according to this threshold cannot be strictly understood as pure proactive investigation, because the investigation of a criminal organization will also always include already committed crime. However, the focus of the investigation is broader and includes also future criminality. Consequently, the focus of the investigation will be proactive: to confront the criminal organization as a whole by investigating the organization and its members, before revealing what is on track by prosecuting a single criminal offense committed by the organization.¹⁹⁵ Nevertheless, a proactive criminal investigation with the help of special investigative techniques remains an exception, created especially for the most complex forms of criminality, considering the

¹⁹¹ *Kamerstukken II* 1995/96, 24 072, nos. 10-11, 413-415 (Rapport van de Parlementaire Enquêtecommissie Opsporingsmethoden 1996). See also Krommendijk et al. 2009, 10.

¹⁹² HR 19 December 1995, *NJ* 1996, 249, ann. Sch., para 6.4.4.

¹⁹³ *Kamerstukken II* 1995/96, 24 072, nos. 10-11, 413-414 and 451 (Rapport van de Parlementaire Enquêtecommissie Opsporingsmethoden 1996) and *Kamerstukken II* 1996/97, 25 403, no. 3, 4.

¹⁹⁴ *Kamerstukken II* 1996/97, 25 403, no. 3, 4.

¹⁹⁵ *Kamerstukken II* 1996/97, 25 403, no. 3, 4 and 5.

limitation to the investigation of organized crime where serious crimes are being committed or will be committed.¹⁹⁶ Considering the additional requirement of the involvement of ‘crimes that result in a serious infringement of the legal order considering their nature or relation with other crimes and for which crimes pre-trial detention can be imposed under the law’, the proactive investigation will concern criminal organizations that engage in serious criminal activities such as human trafficking, the drugs trade or the arms trade.¹⁹⁷

2.2.2.2.2 Investigative Methods with a Specific Legal Basis in Special Criminal Acts

Criminal offenses are not only provided in the Penal Code, but also in some special criminal Acts. The CCP applies to the investigation of all criminal offenses, including those criminalized in these special criminal Acts. Hence, the criminal investigation also covers the investigation of these offenses. Where special investigative officers¹⁹⁸ have been attributed responsibility for the criminal investigation of offenses criminalized in these special criminal Acts, they likewise operate under the supervision of the public prosecutor.¹⁹⁹

Besides defining criminal offenses, some of the special criminal Acts provide for a specific legal basis for the use of investigative methods, additional to the criminal investigative methods provided in the CCP. Some of these investigative methods may be used for the *criminal investigation* of offenses criminalized in the special criminal acts. Others are attributed for exerting *control* over the observance of the special criminal act.

For example, the Road Traffic Act [*Wegenverkeerswet 1994*, *WVW 1994*] gives investigative officers or special investigative officers (under Article 142 CCP, but also others designated under Article 159 *WVW 1994*) the power to stop vehicles (Article 160(1) *WVW 1994*) or to order that someone cooperates with a breath test (Article 160(5) *WVW 1994*). These powers entail administrative supervisory powers concerning the observance of the Road Traffic Act, for which the presence of a reasonable suspicion is not required.

Furthermore, some of the special criminal Acts also provide for specific criminal investigative methods, some of which can be used subject to lower standards than similar methods regulated in the CCP. For example, the Economic Offenses Act [*Wet op de economische delicten*, *WED*], provides investigative officers with the power to enter places and to search vehicles for the purpose of the

¹⁹⁶ Regardless of the fact that the limited availability of proactive investigative means must be put into perspective because of the possibility of a ‘reactive’ criminal investigation of preparatory acts, which still means that, except for clarifying a reasonable suspicion of that crime having been committed, also proactive goals will be realized.

¹⁹⁷ Krommendijk et al. 2009, 11.

¹⁹⁸ Article 142 CCP.

¹⁹⁹ Article 157 CCP. In addition, also ‘regular’ law enforcement officers (Article 141 CCP) are authorized to investigate criminal activities criminalized in the special criminal acts.

criminal investigation of offenses covered by the Act (Article 20-23 WED). The Drugs Act [*Opiumwet*] allows investigative officers and special investigative officers (e.g. customs officers) to search vehicles, to enter places, to frisk persons seriously suspected of a drugs crime and to seize goods (Article 9 *Opiumwet*). Lastly, the Weapons and Ammunition Act [*Wet wapens en munitie, WWM*] provides for some far-reaching investigative powers. Investigative officers can search places for the purpose of seizure if they reasonably suspect that weapons are present in that place (Article 49). Furthermore, investigative officers have the power to search things, including luggage, when there is a reasonable reason to do so: a) after a crime has been committed with the help of a weapon; b) in case of an offense as specified in the Act; and c) in the case of 'indications' that a crime as referred to under a and b will be committed.²⁰⁰ Moreover, the public prosecutor can order the search of things belonging to every person²⁰¹ and the mayor can order that in a security zone things belonging to any person present in that area are to be searched.²⁰² The same powers have been created with regard to vehicles.²⁰³ The Weapons and Ammunition Act provides, furthermore, for the power to seize things (Article 52(1) and for frisking powers under the same conditions as are applicable to search powers (Article 52(2) and (3)). Especially, the Drugs Act and the Weapons and Ammunition Act provide for some far-reaching powers that have been considered necessary taking into account the nature of the offenses criminalized in these statutes, the safety of the investigative officers or the possibility to mislay, for instance drugs, when there is no immediate action.

The bases for investigative methods provided for in the special criminal Acts differ with regard to two important aspects from the investigative powers attributed in the CCP. In the first place, the majority of the investigative methods specifically provided for in the special criminal acts concern administrative supervisory methods, to be used for the purpose of the preventive enforcement of the special criminal Act by controlling the observance of the Acts. Consequently, the use of these administrative supervisory methods fall outside the scope of the criminal investigation and are, thus, not supervised by the public prosecutor²⁰⁴ and are not

²⁰⁰ Article 50(1) Weapons and Ammunition Act.

²⁰¹ Article 50(2) Weapons and Ammunition Act.

²⁰² Article 50(3) Weapons and Ammunition Act.

²⁰³ Article 51 Weapons and Ammunition Act.

²⁰⁴ This division of responsibility between the public prosecutor and the mayor on the basis of their respective responsibility for the criminal investigation and the maintenance of order (Articles 2, 12 and 13 Police Act 1993) is not always self-evident. The issue of responsibility for investigative officers exerting administrative supervisory powers, such as for example the power to stop a car in order to control observance with the Road Traffic Act (Article 160 WVV 1994), is less clear, considering that sometimes also persons other than police officers may use this controlling power (compare Article 159 WVV 1994) and, more in general, that the use of administrative supervisory powers on behalf of law enforcement officers very often overlaps or concurs with their criminal investigative task. Luchtman argues on the basis of this latter argument for supervision by the PPS also concerning the use of administrative supervisory powers. Luchtman 2007B, 669-672.

subjected to other criminal procedural safeguards. However, as already indicated in [Sect. 2.2.2.1](#), the use of administrative supervisory powers and criminal investigative powers often overlap, considering that the use of an administrative supervisory power can result in a reasonable suspicion of a criminal offense and that the investigative officer is usually authorized to apply both administrative supervisory powers and criminal investigative powers. The Supreme Court has repeatedly addressed the situation where the task of administrative supervision and criminal investigation overlap,²⁰⁵ which has resulted in the acceptance of the use of administrative supervisory powers also for a criminal investigative purpose as long as the administrative supervisory powers have not been used *exclusively* to pursue criminal investigative purposes.²⁰⁶

For example, in 2006 the Supreme Court allowed the use of the administrative supervisory power to stop a vehicle to control, e.g., the license of the driver, whereas it seemed that the police officers in question were particularly concerned with the possibility that one or more of the passengers were suspected of theft.²⁰⁷ Hence, the availability of these administrative supervisory powers also strengthens the investigative capacity of the criminal investigation by being able to ‘build’ a criminal case against someone by using (initially) administrative supervisory powers.²⁰⁸ Nevertheless, when administrative supervisory powers are used against a suspect, the investigative officers must take into account the rights attributed to suspects, such as the right to remain silent.²⁰⁹

In the second place, some criminal investigative methods provided in the special criminal acts can be applied subject to lower standards than the investigative methods regulated in the CCP. As follows from the examples mentioned above, under the WED investigative methods can be used if they serve the interest of the investigation. Also the Drugs Act includes similar methods. Furthermore, the Weapons and Ammunition Act allows for a search on the basis of ‘indications’ that a crime will be committed with the help of a weapon. Also the requirement under the WED and Drugs Act of ‘reasonably serve the interest of the investigation’ is understood to refer to ‘indications’ that one or more regulations of the Act have not been observed. Both criteria concern lower thresholds than the

²⁰⁵ Identified as the ‘cumulating of spheres’ by Luchtman. Luchtman 2007A, 133-142 and 645-651. See also: Luchtman 2007B, 660-661.

²⁰⁶ HR 26 April 1988, *NJ* 1989, 390, ann. ThWvV (Leidraad arrest) and HR 21 November 2006, *NJ* 2006, 653.

²⁰⁷ HR 21 November 2006, *NJ* 2006, 653.

²⁰⁸ A distinction between administrative supervision and criminal investigation was, in the first place, intended to serve a shield goal, considering that in order to protect the rights of citizens the more far-reaching power of the government to act in the context of criminal procedural law is subjected to more restraints and includes more safeguards than the power of the government to act in the context of administrative law. For this reason the demarcation of the criminal investigation from administrative supervision is dealt with in more detail in [Sect. 2.3.2.2.2](#).

²⁰⁹ Persons subjected to administrative supervisory powers are obliged to cooperate, whereas under criminal procedural law someone has the right to remain silent as part of the right not to cooperate in someone’s own conviction. See HR 26 April 1988, *NJ* 1989, 390.

central requirement of a reasonable suspicion for the use of investigative methods under the CCP, which also allow for a proactive criminal investigation. The latter possibility is even stronger considering the possibility of overlapping purposes when administrative supervisory powers are used.

2.2.2.3 The Preliminary Investigation

By the Act of 1999 regulating the use of SIT, also the ‘preliminary investigation’ has gained a separate place in the CCP (Article 126gg). The preliminary investigation officially ‘precedes’ the criminal investigation as defined in 132a CCP. It can be initiated in preparation for a full criminal investigation and is aimed at the gathering of information for that purpose. The intention of formulating the purpose of the preliminary investigation in that manner is to separate it from the phase of the criminal investigation, considering that the purpose of the (full) criminal investigation concerns the collection of information for the making of prosecutorial decisions. This separation seems somewhat artificial since the information collected during the preliminary investigation subsequently becomes part of the criminal investigation and in that way equally forms the basis for making prosecutorial decisions. In addition, the preliminary investigation is, according to Article 13 of the Police Act 1993, also conducted under the responsibility of the public prosecutor. For this reason, in this research the term criminal investigation refers also to the preliminary investigation. When the term full criminal investigation is used, this is explicitly intended to separate the preliminary investigative phase from the full criminal investigation. In addition, the preliminary criminal investigation will be considered as a separate basis for conducting investigative activities with the help of the investigative methods that are exclusively reserved for the preliminary investigative phase. This should be compared to the full criminal investigation, which is the phase where special investigative techniques can be used.

The preliminary investigation can be described as an investigation that aims at taking criminal procedural steps and that generates information which is reducible to specific persons.²¹⁰ If the information available is insufficient for establishing a reasonable suspicion and, thus, for initiating a (full) criminal investigation, a preliminary investigation can be started if the information available does show indications that among groups of people crimes are being planned or committed. In such a situation an additional investigation will be desirable in order to collect the necessary information for starting a full criminal investigation.²¹¹ For example, a whole sector (such as a harbor, a transport or airport sector) can be investigated in order to determine in which specific part and in what manner criminal activities are taking place.

²¹⁰ Buruma 2001, 134.

²¹¹ *Kamerstukken II* 1996/97, 25 403, no. 3, 49.

The investigative activities that can be conducted in the preliminary investigation are not unrestricted: special investigative techniques are precluded; activities that aim to gather information which is reducible to specific persons fall within the scope of the preliminary investigation. The specific activities that can be conducted within the scope of the preliminary investigation are not explicitly mentioned in the provision. The nature of the permitted activities can be derived from the explanatory memorandum, mentioning, for example, the comparison of information stored in police files with information obtainable from open sources. The information gathered from open sources or with voluntary cooperation concerning personal particulars can be temporarily stored in police files.²¹² Information already gathered in another criminal investigation, obtained through using one or more regulated SIT, such as observation or the recording of private communications during a full criminal investigation, can be used in a preliminary investigation in order to prepare a new full criminal investigation.²¹³ According to the second section of Article 126gg CCP, the public prosecutor can order that a law protecting privacy, which determines that information from public files may only be used and spread for the purpose for which they are stored in that specific file, does not apply.²¹⁴ This information can then be obtained within the scope of the preliminary investigation and thus be used for criminal investigative purposes.

2.2.2.4 The Investigative Powers of the Intelligence Community in Relation to Criminal Justice

2.2.2.4.1 The Investigative Powers of the AIVD

The AIVD has been attributed far-reaching investigative powers for the purpose of fulfilling its task of averting threats and protecting national security and other vital state interests.²¹⁵ These powers have for the first time been specifically attributed by law in the WIV 2002. On the basis of Article 17 WIV 2002 the AIVD has the general authority to collect information²¹⁶ from other governmental or private organizations or persons without being hindered by legal rules protecting personal privacy. The person from whom the information is requested is, however, not obliged to cooperate.²¹⁷ Apart from its common authority to gather intelligence (Article 17 WIV 2002), the service has “special powers” at its disposal for the

²¹² See Act on Police Information [*Wet politiegegevens*], *Stb.* 2007, 300.

²¹³ According to Article 126dd CCP, information obtained through some SIT can be used in a different criminal investigation, which includes the preliminary investigation.

²¹⁴ Personal Data Protection Act [*Wet bescherming persoonsgegevens*], Article 9(1).

²¹⁵ Article 6 WIV 2002 (see [Sect. 2.2.1.4](#)).

²¹⁶ The AIVD collects *information*, which is subsequently combined and analyzed by the AIVD resulting in *intelligence*. Muller 2007, 171.

²¹⁷ Muller 2007, 173.

purpose of gathering information, which include: observation, the use of undercover agents, electronic surveillance, searching enclosed places or objects, the opening of personal correspondence and demanding information from automated systems with the help of false keys, signals or identities.²¹⁸ These powers are comparable to the special investigative techniques available in the criminal investigation, but without subjecting them to the safeguards provided in the regulation of SIT in the CCP, most notably a threshold such as having a 'reasonable suspicion'. This means that in practice criminal activities that at the same time pose a threat to national security may be investigated by the police and the PPS with the help of SIT in order to prepare a criminal prosecution and, simultaneously, by the AIVD in the light of the protection of national security.

The powers available to the AIVD are regulated by requiring, for the use of the most intrusive powers, the permission of the relevant Minister and, otherwise, on behalf of the Minister, the permission of the head of the AIVD. The mandate of the District Court of The Hague is required before the AIVD can use the special power of opening personal correspondence.²¹⁹ Furthermore, the principles of proportionality and subsidiarity must be taken into account at all times. This means, firstly, that the powers will immediately be terminated if the objective of the power used has been accomplished. And, secondly, a power cannot be used when a less far-reaching power would suffice.²²⁰ In this manner internal control is meant to be exerted, which is furthered by requiring a written report after the use of any of these powers.²²¹ External control over the activities of the intelligence services is, contrary to the control of law enforcement activities, not judicial, but political. Parliament controls through the political accountability of the Ministers responsible for the intelligence services. In addition, the Act of 2002 has provided for an independent oversight committee for the information and security services, which is a controlling body for the work of the intelligence services. This oversight committee has been established in order to provide an external independent controlling body in addition to the internal control.²²² The committee is responsible for supervising the legitimacy of the execution of the intelligence services' tasks, and for informing and advising the relevant Ministers on any findings by the committee as well as on the investigation and assessment of complaints.²²³ This control is exerted afterwards and, according to the legislature, meets the requirements of Article 13 and Article 8 ECHR. The committee has access to all information (written reports) and can hear all staff belonging to the services. It also has

²¹⁸ Article 20-30 WIV 2002. For a translated version of the full list of the AIVD's investigative powers see Articles 20-30 of the English version of the WIV 2001, available at: <https://www.aivd.nl/english/aivd/the-intelligence-and/> (accessed July 19, 2011).

²¹⁹ The power to open personal correspondence is provided with an additional check, because the confidentiality of mail is protected as a Constitutional right in Article 13 Constitution.

²²⁰ Article 32 WIV 2002.

²²¹ Article 33 WIV 2002.

²²² *Kamerstukken II* 1997/98, 25 877, no. 3, 78-79.

²²³ Article 64 WIV 2002.

the authority to hear witnesses and experts and to access places. The reports of the review committee are public.²²⁴ Lastly, the Minister must inform, five years after the use of special powers against a person, whether that person can be notified about the use of the special powers. This duty to investigate whether the person can be notified does not apply when notification will adversely affect some serious interests, such as the interest in retaining shielded sources of the AIVD or of foreign intelligence services.²²⁵ A person may also request whether personal information regarding him/her has been collected by the AIVD.²²⁶

It can be concluded that far-reaching special powers are available to the AIVD, which have a comparable or even more far-reaching character than the special investigative techniques available to law enforcement agencies. Because the AIVD's task is to protect national security and not to collect evidence for criminal prosecution, the AIVD's use of these special powers is not further restrained by some threshold, such as having a reasonable suspicion under criminal procedural law, nor subjected to judicial review. The use of the special powers must only relate to the exercise of their tasks as mentioned in Article 6 WIV under a and d (see [Sect. 2.2.1.4](#)), which means in general that the use of such powers should concern the protection of national security. Because national security is not a clearly defined term, the AIVD has been given wide discretion in using special powers for exerting its tasks.²²⁷ The AIVD is only regulated through requiring authorization by the relevant Minister, by the principles of proportionality and subsidiarity and subject to political external control and an independent *ex post* oversight committee.

2.2.2.4.2 Transfer of Information Obtained by the AIVD to Law Enforcement Services

Any responsibility of the AIVD for the criminal investigation has been explicitly excluded and, hence, the investigative officers of the AIVD do not have criminal investigative powers in the sense of Article 141 or 142 CCP. The intelligence community, on the basis of its tasks, is strictly separated from the law enforcement community. Nevertheless, when the AIVD encounters information which is relevant to a criminal investigation, it is allowed to transfer this information to the national public prosecutor. In that way the AIVD can incite the law enforcement community to start a criminal investigation or, in more urgent situations, directly resort to the use of coercive methods such as arrest and pre-trial detention in order to avert a threat.

A 1992 note by the Minister of Justice addressing the special parliamentary commission on the intelligence and security service regarding the 'evidentiary

²²⁴ Article 74-79 WIV 2002.

²²⁵ Article 34 WIV 2002.

²²⁶ Article 47 WIV 2002.

²²⁷ Compare: Vis 2010A, 421.

value of information obtained by the BVD (the National Security Service which was the predecessor of the AIVD) already provided that although the task of the AIVD is not and will not be to investigate criminal offenses for the purpose of criminal prosecution, the information and material collected by the BVD can provide a cause for initiating a criminal investigation on behalf of the agencies thereby authorized as well as to establish a reasonable suspicion under Article 27 CCP'.²²⁸ The transfer of information from the AIVD to the PPS has been given an explicit basis in the Act of 2002. The AIVD can, on the basis of Article 38, disclose information to the PPS by means of an official report [*ambtsbericht*] when it appears that the information can also be relevant to the investigation or prosecution of offenses. This provision does not entail an obligation to disclosure and the AIVD will only proceed to disclose when this will not harm national security interests. The official report contains information without revealing the source and the methods applied to obtain that information or the agency's actual level of knowledge. The official report will be sent to one of the two national public prosecutors who bear responsibility for countering terrorism and for other criminal cases that also relate to the activities of the AIVD (henceforth: the national public prosecutor for counterterrorism). These national public prosecutors for counterterrorism will subsequently decide whether or not these reports need to be sent to offices of the PPS in order to initiate a criminal investigation.²²⁹ For making this decision, the national public prosecutor for counterterrorism can, on the basis of Article 38(3) WIV 2002, request from the AIVD all information on which the report has been based, in order to be able to assess the reliability of the report and the usefulness of the information for criminal investigative action. Consequently, the national public prosecutor for counterterrorism is likewise bound by secrecy.²³⁰

The Supreme Court has also affirmed that there is no legal provision that forbids the use of information gathered by an intelligence agency in the criminal process, which also means that this information can establish a reasonable suspicion under Article 27 CCP and can be used as evidence in a trial.²³¹ In addition, according to the Supreme Court, no legal rule forbids the PPS or other law enforcement service from requesting more specific information from the intelligence community.²³² This request by the PPS is, however, limited to information in addition to the

²²⁸ *Kamerstukken II* 1991/92, 22 463, no. 4, 2 and 6. During the discussion of the bill underlying the current WIV 2002, the responsible Ministers concluded that the main lines of the note of 1992 still concerned the correct and practicable description of the manner in which information gathered by the BVD can be used in furtherance of a criminal investigation. *Kamerstukken II*, 1997/98, 25 877, no. 14, 12. See also Hirsch Ballin 2009, 289.

²²⁹ Muller 2007, 180.

²³⁰ Articles 85-86 WIV 2002.

²³¹ HR 5 September 2006, *NJ* 2007, 336, para 4.5.1. Also the development where courts give more leeway to the possibility of using intelligence information in criminal investigations and further proceedings will be dealt with in [Chap. 3](#).

²³² HR 13 November 2007, *NJ* 2007, 614, para 3.5.2.

official report, information which is thus already available. It cannot request the intelligence service to conduct a further investigation in a specific case. This would entail an abuse of power (*détournement de pouvoir*) resulting in the circumvention of the protective function of criminal procedural law.²³³ It is a violation of the law when the law enforcement community intentionally refrains from using SIT in order to make use of the information gathered by the intelligence community or when the intelligence community uses its powers for prosecutorial purposes.²³⁴ When the AIVD sends an official report to the PPS, this does not mean that the intelligence service must end its investigation. A parallel investigation is possible to the extent that the intelligence agency and the law enforcement agency only use their powers with the intention to fulfill their own task.²³⁵

An exchange in the other direction—from law enforcement to intelligence—constitutes a duty for the law enforcement services when the information available is relevant for protecting national security. Officers of the PPS will “inform a service of the information brought to their notice if they deem this to be in the interest of this service.”²³⁶ The same holds true for police officers.²³⁷ For this purpose an automated system has been established, through which the AIVD can search police files on the basis of a hit/no hit system with their own intelligence. When the AIVD finds a ‘hit’ within the system, the police are obliged to transfer the information directly to the AIVD on the basis of Article 62 WIV 2002.²³⁸ The intelligence services are also entitled to “render technical support to the bodies responsible for the investigation of offenses.”²³⁹

2.2.3 Conclusion

In the explanatory memorandum of the CCP the wish was expressed that ‘the actors, who have been attributed the task of investigating and prosecuting for the purpose of repressing crime and protecting the victims, shall be attributed the powers required to act quickly and decisively, being able to do what is required under the specific circumstances of a case, and shall not be hindered by regulations which are too stringent.’²⁴⁰ For this purpose the CCP clearly delineates which actors have the task of conducting criminal investigative activities for the purpose

²³³ *Kamerstukken II* 2003/04, 29 743, no. 7, 23.

²³⁴ HR 13 November 2007, *NJ* 2007, 614, para 3.4.2 and HR 5 September 2006, *NJ* 2007, 336, para 4.7.2 and 6.4.2.

²³⁵ HR 13 November 2007, *NJ* 2007, 614, para 5.2.2.

²³⁶ Article 61 WIV 2002.

²³⁷ Article 62 WIV 2002.

²³⁸ Vis 2010B, 130.

²³⁹ Article 63 WIV 2002.

²⁴⁰ Lindenberg 2002, 424 (MvT 16-17).

of truth-finding and which powers these actors have at their disposal to exercise this task. This does not mean that on the basis of the CCP also the scope of the sword capacities can be precisely demarcated. The requirements for the use of criminal investigative powers provide investigative discretion to the police or PPS. Moreover, the criminal investigation itself covers all investigative activities conducted for the purpose of making prosecutorial decisions by law enforcement officers and under the supervision of the public prosecutor. Although the system was traditionally developed as a reactive system, today the CCP and the special criminal statutes also provide possibilities to act proactively, especially where (serious) organized crime is involved.

On the basis of the system laid down in the CCP, the conclusion can be drawn that the truth-finding actors have been organized in a stratified system, based on a shared system of responsibilities for the criminal investigation with a hierarchical dimension related to the interests at stake when seeking to use a specific investigative method. Only those actors that have been given the task of criminal investigation may use criminal investigative powers for the purpose of truth-finding (or: 'making prosecutorial decisions'). The PPS is the central actor in the criminal investigative phase, bearing the responsibility for the criminal investigation and supervising the investigative activities of the police. Nevertheless, the police will in practice largely conduct the criminal investigative activities. The examining magistrate, as a warrant judge, may provide the required authorization for using some of the most intrusive techniques.

In addition, the AIVD has been addressed as a relevant actor in the criminal investigation, considering that the AIVD may send 'official reports' to the PPS, which may subsequently be used as information to commence a criminal investigation. Through this path of transferring information between the otherwise strictly separated communities of intelligence and law enforcement, the 'sword capacity' of the law enforcement community is strengthened by the provision of information that may be relevant for establishing the truth concerning criminal activities.

Also the bases for using criminal investigative powers, as required under the principle of legality, can be found in the CCP and the special criminal Acts. In accordance with the requirements of Article 8 ECHR, those investigative powers that interfere more than to a limited extent with the right to respect for private life have been given a precise statutory basis. These statutory bases for the more intrusive techniques have only been created by the Act on SIT of 1999, making a distinction between two investigative domains: the classical investigation and the organized crime investigation. Because of the more complex nature of the criminal investigation of terrorism, the possibilities to use SIT proactively are broader for the criminal investigation of organized crime than for the criminal investigation of conventional crime. In addition, the legislature has provided investigative powers to 'prepare' a full criminal investigation by making it possible to combine and analyze certain files, including the possibility to set aside privacy 'protective purpose limitations' and thus to enable the use of files stored for other purposes also for preparing the criminal investigation. Criminal investigative officers (those

attributed with that task on the basis of Article 141 or 142 CCP) may use other, not specifically regulated, investigative powers on the basis of their criminal law enforcement task under Article 2 Police Act 1993. On the basis of Article 2 Police Act 1993 only criminal investigative powers may be used that do not, or only to a limited extent, interfere with the right to respect for private life. In addition, special criminal Acts provide for administrative supervisory powers and criminal investigative powers. Also the administrative supervisory powers (used to control the observance of provisions of the special criminal Acts) may be relevant for the criminal investigation, considering that administrative supervision and criminal investigation may overlap and, in that situation, the use of administrative supervisory powers may *also* be used for criminal investigative purposes.

2.3 The Shield Function of the Dutch Criminal Investigation

The shield function of the regulation of the criminal investigation in the Netherlands is primarily realized by a hierarchical system of authorization and, consequently, controlling responsibilities and specific legal protective elements in the system of the CCP, such as specific legal provisions for intrusive investigative powers and requirements that aim to realize control. The main purpose of the regulation can be formulated as protecting against arbitrary interferences with the citizen's right to respect for private life, restricting the use of especially intrusive investigative powers to the minimum and anticipating a fair trial process aimed at establishing the substantive truth. Hence the division of responsibilities between the actors and the other protective elements in the system of criminal investigation as adopted—most significantly—in the Dutch CCP are underpinned by the rights and principles described in [Sect. 2.1.3](#). The second part of the current chapter is dedicated to describing this shield function of the regulation, by firstly dealing with the division of responsibilities between the actors involved in the criminal investigation, including the suspect and any other persons subjected to criminal investigative powers, and, secondly, describing the adopted protective elements.

2.3.1 *The Responsibility of the Actors Towards a Fair Procedure*

The Netherlands has chosen for a hierarchical structure of authority as a method to realize state accountability by attributing powers to the actors in Dutch criminal procedural law by means of a stratified system. The stratified system is adopted in order to “police” the government's own use of criminal procedural powers.²⁴¹

²⁴¹ Brants et al. 1995, 44. According to Damaška, this system of realizing state accountability is typical for legal systems with a civil law origin. Damaška 1986, 47-50.

This can, for example, be recognized in the organization of the criminal investigation, where the police require an order by the public prosecutor for using some more far-reaching investigative powers, and where the examining magistrate shall authorize the use of one of the most intrusive investigative powers. The responsibility for the criminal investigation in its entirety concerns a *shared* responsibility between the public prosecutor and the examining magistrate: both have been attributed an individual responsibility to control the legitimacy and the fairness of the course of events during the criminal investigation. Afterwards, the trial judge has been given the power to exert control over the legitimacy of the activities conducted during the criminal investigation.²⁴²

This section will start with the controlling function of the state and the judicial actors that have truth-finding powers, including the trial judge with a truth-finding task during trial. As will follow in the subsequent sections, the overall responsibility for the fairness of the criminal proceedings is an interrelated responsibility between the different actors. Furthermore, the position of the actors that are mainly the subject of investigation—the suspect and other persons investigated—will be dealt with as well as their possibilities to challenge the legitimacy of the investigation against them and the availability of remedies upon the establishment of illegitimate investigative action.

2.3.1.1 The Police

Although the police operate with regard to the law enforcement task under the responsibility of the PPS,²⁴³ the police also have, as government officials, an independent responsibility to observe fundamental rights when carrying out their function and to contribute to a fair criminal procedure in which the fundamental rights of citizens are observed.²⁴⁴ As explained in [Sect. 2.1.3.3](#), Article 6 ECHR covers the proceedings as a whole and, therefore, also includes the fairness of criminal investigative activities before trial.

The judge who will examine whether the investigative activities were conducted legitimately, possibly resulting in procedural sanctions upon the establishment of illegitimate behavior, also directs investigative officers to observe fundamental rights, to comply with the legal requirements and to ensure the integrity of the criminal investigative activities in general. Nevertheless, this prospect of being held accountable for investigative action will only occur when someone is also actually prosecuted. In many situations, investigative action does not result in the establishment of sufficient evidence for subsequent criminal procedural steps, especially when investigations are conducted proactively. In addition, the

²⁴² See also HR 11 October 2005, *NJ* 2006, 625, para 3.5.1 and 3.5.2 and HR 21 November 2006, *NJ* 2007/233, ann. Mevis, para 3.4 and annotation para 3.

²⁴³ Compare Article 2 Police Act 1993.

²⁴⁴ Muller et al. 2007, 559-560.

anticipation of trial proceedings is usually not a direct concern for police officers. The responsibility of the police for the fairness of the proceedings as a whole (as the touchstone under Article 6 ECHR and relevant for imposing sanctions on illegitimate actions which have taken place during the criminal investigation²⁴⁵) is subordinate to the responsibility of the public prosecutor, who is, considering his/her continual role as a prosecutor in criminal proceedings, more aware of the procedural consequences of illegitimate actions during the police investigation.

More precisely, the judge will have to examine whether the investigative officers have acted within the boundaries of the law. The principle of legality imposes on each truth-finding actor the duty not to exceed the limits of their powers as attributed by the law. For the police this entails primarily the responsibility to determine whether or not a reasonable suspicion is present, justifying the initiation of a criminal investigation. Furthermore, except for determining whether the investigative activity is in accordance with the law, the investigative officer is responsible for determining in concrete cases whether the use of a specific investigative power is also justified in the light of the circumstances of that particular case. The trial judge, in line with this responsibility, will not only examine whether the investigative activities have occurred within the boundaries of the law, but also whether the investigative officer has not violated (administrative) principles of the due administration of justice.²⁴⁶ Principles of the due administration of justice concern the principles of legitimate expectations, the principle of equality before the law, the principles of proportionality and subsidiarity and the principle of *détournement de pouvoir*.²⁴⁷ For the investigative officer, this means that he/she is required to balance the interests involved in a particular case, which primarily entails an assessment of the proportionality and subsidiarity²⁴⁸ of the intended activity and a limitation to using the criminal investigative power only for the purpose of truth-finding and, thus, a prohibition on general fishing expeditions. In 1978 the Supreme Court held for the first time that the legitimacy of criminal investigative activities shall not only be examined on the basis of the legal requirements, but additionally, on the basis of the principles of the due administration of justice, resulting in that case in the conclusion that the behavior of police officers who had entered a home by breaking a window was not in compliance with the principle of subsidiarity; the police could have chosen a less intrusive method to enter the home.²⁴⁹ Hence, not only when the statutory conditions require the principles of proportionality and subsidiarity to be observed (as is e.g. implied in

²⁴⁵ See on this in more detail [Sect. 2.3.1.4](#).

²⁴⁶ See [Sect. 2.1.3.4](#). The applicability of these administrative law principles to a criminal investigation has been acknowledged by the Supreme Court in HR 12 December 1978, *NJ* 1979, 142 ann. GEM. Muller, Dubelaar and Cleiren formulate 15 different principles for police work which are relevant for all the tasks of police officers. Muller et al. 2007, 597. The mentioned principles nevertheless apply in particular to the criminal investigative activities of the police.

²⁴⁷ See [Sect. 2.1.3.4](#) and Corstens 2008, 62-73.

²⁴⁸ See on the contents of these principles [Sect. 2.1.3.4.1](#).

²⁴⁹ HR 12 December 1978, *NJ* 1979, 142, ann. GEM.

the condition ‘in the interest of the investigation’ included in the provisions for SIT), but also when the police conduct investigative activities on the basis of Article 2 Police Act 1993, are the police bound by the principles of proportionality and subsidiarity.²⁵⁰

When the police require an order from the public prosecutor or also an authorization by the examining magistrate, the balancing of the interests involved is largely the responsibility of the ‘higher’ authority. This hierarchical system, both for determining whether the investigative method sought is in accordance with the law and for determining the proportionality and subsidiarity of the use of the investigative method, has been acknowledged by the Supreme Court. When a ‘higher’ authority has been responsible for this determination, also the examination of the trial judge may be more marginal.²⁵¹ Nevertheless, during the execution of an order the investigative officers need to continually take into account the proportionality and subsidiarity of the manner in which the special investigative technique is being applied. Obliging the police to observe the principles of the due administration of justice, in particular the principles of proportionality and subsidiarity, is intended to guide police officers in their investigative efforts where they are attributed certain discretion.²⁵²

Lastly, police officers have the obligation under the law to report all their criminal investigative activities and this aims to facilitate defense rights as these reports largely constitute the basis for challenges regarding illegitimate investigative activities. In addition, these reports, to be included in the *dossier*, are also the basis for the controlling function of the trial judge in relation to the fairness of the criminal investigation. The duty to draw up records as provided in Article 152 CCP obliges police officers to report all investigative activities conducted and in that way to facilitate *ex post* transparency with regard to the course of the criminal investigation. The precise scope and function of this duty will be dealt with in Sect. 2.3.2.4.1.

2.3.1.2 The Public Prosecutor

The public prosecutor is the supervisor of the criminal investigation on the basis of Article 148 and Article 132a CCP. It is his task to control the legitimate conduct of the criminal investigation, which he can do by instructing the investigative officers, and keeping an oversight over the course of the investigation as a whole. One of the main concerns of the Van Traa Parliamentary Inquiry Commission was the

²⁵⁰ According to Naeyé criminal investigative methods based upon Article 2 Police Act 1993 shall comply with the following fundamental principles for police action: proportionality, subsidiarity, reasonableness and moderateness (J. Naeyé, *De reikwijdte van fundamentele rechten*, Handelingen NJV 1995-I, 272), referred to in: Fokkens and Kirkels-Vrijman 2009, 124.

²⁵¹ See also HR 11 October 2005, *NJ* 2006, 625, para 3.5.1 and 3.5.2 and HR 21 November 2006, *NJ* 2007, 233, ann. Mevis, para 3.4 and annotation para 3. See also Franken 2009, 84-85.

²⁵² Franken 2009, 82.

lack of control by the PPS over the quality and the legitimacy of the criminal investigation and the investigative powers used. However, the Commission also acknowledged that, considering the central position which the public prosecutor owes to his authority to decide which cases to investigate in the criminal investigation, the public prosecutor should retain the controlling responsibility.²⁵³ This required, however, some organizational changes in order to strengthen the position of the public prosecutor as the supervisor of the criminal investigation.²⁵⁴ These recommendations have been implemented in the Act of 1999 on special investigative techniques by requiring an order by the public prosecutor for using SIT. Moreover, the supervisory role of the public prosecutor has been included in the definition of the criminal investigation (Article 132a CCP).²⁵⁵ Hence, the Act of 1999 has importantly enhanced the responsibilities of the public prosecutor with regard to the criminal investigation.²⁵⁶ The public prosecutor is now more aware of his role as the central actor in the criminal investigation, including his responsibility to exert control.²⁵⁷

As the supervisor of the criminal investigation the public prosecutor has an important responsibility with regard to the legitimacy, fairness and overall integrity of the investigative activities. The constitutional position of the PPS as part of the judiciary should give public prosecutors an impartial and independent position, a position which obliges all interests to be taken into account when carrying out the truth-finding task. In the previous section, it has already been indicated that the responsibility of the police for the fairness of the criminal investigation is subordinate to the responsibility of the public prosecutor. Hence, the principle of legality, the right to a fair trial, the right to privacy and the principles of proportionality and subsidiarity more strongly require the public prosecutor to act according to his responsibility for guaranteeing the legitimacy, fairness and overall integrity of the criminal investigation. Especially considering the prospect of the course of events being examined during the criminal investigation at trial, an important aspect of the supervisory role of the public prosecutor will be to direct and control the police to ensure that their investigative activities are within the borders of the law and that they observe the principles of the due administration of justice.

The supervisory role of the public prosecutor is in particular present when special investigative techniques are used in the criminal investigation. An order by the public prosecutor is required before SIT can be applied by the police, for which reason the public prosecutor shall determine whether the legal requirements are met (in particular, the presence of a reasonable suspicion of a crime or a reasonable suspicion that crimes are committed or will be committed in an organized

²⁵³ Article 148 CCP and Article 13 Police Act 1993.

²⁵⁴ Rapport van de Parlementaire Enquêtecommissie Opsporingsmethoden 1996, 439.

²⁵⁵ This supervisory role for the PPS has been maintained in the new definition adopted by the Act on the Criminal Investigation of Terrorist Crimes of November 2006, *Strb.* 2006, 580.

²⁵⁶ Mevis 2005B, 454.

²⁵⁷ Beijer et al. 2004, 160.

context) and whether the use of the investigative method is also in accordance with the principles of proportionality and subsidiarity.

These principles, which have not been explicitly adopted in the CCP, have been attributed an important regulatory effect in the criminal investigation in addition to the requirements formulated in the law. It is the primary responsibility of the public prosecutor as the supervisor of the criminal investigation to make sure that these principles are observed in all circumstances. Proportionality means that the method used is proportionate to its aims. The investigation of serious crimes implies that more intrusive methods are proportionate to the harm that is done to the rights and liberties of the people investigated. The statutory requirement of 'a serious infringement of the legal order' or the limitation to crimes for which pre-trial detention can be imposed (serious crimes) are in fact references to the application of the principle of proportionality. The use of a special investigative technique that has serious implications for the rights and liberties of the persons being investigated is only justified—proportionate—when it is used for investigating serious crime that results in a serious infringement of the legal order. The principle of subsidiarity implies that less intrusive means are not available for the investigation and for achieving the investigative goal intended. If less intrusive methods are available and adequately produce the information needed, then these methods should be applied instead of the methods with a more intrusive character. Both principles should be taken into account at all times and play an important role throughout the whole procedure.

The prosecutor is required to consistently balance the interests involved in each specific phase of the criminal proceedings, where the law offers discretion. The legal provisions which are applicable to the criminal investigation, in particular those regarding the use of SIT as established by the Act of 1999, are, in fact, a consequence of a theoretical, pre-assessment of the interests involved. These provisions of the law are the first layer of regulation to which, most significantly, the public prosecutor is subjected in his/her criminal investigative activities, while the principles of proportionality and subsidiarity shall guide the public prosecutor in addition to these statutory provisions when conducting (or steering) criminal investigative activities.²⁵⁸

Nevertheless, the actual regulatory effect of the principles of proportionality and subsidiarity on the responsibility of the public prosecutor towards the fairness of the criminal investigation is in practice difficult to measure. The examination at trial on the basis of these principles is often rather marginal and has not often resulted in a decision that the investigative activity was illegitimate.²⁵⁹

Furthermore, also the public prosecutor, like the police, has a duty to report his/her investigative activities, thereby making it possible for the trial judge to exert control over the criminal investigation and providing a possibility to challenge the

²⁵⁸ Baaijens-van Geloven and Simmelink 2002, 562.

²⁵⁹ Franken has analyzed the case law in the period 2000–2009 to formulate this conclusion. Franken 2009, 87–92.

legitimacy of the criminal investigative activities by the defense. Article 148(3) provides that the public prosecutor shall compile official reports under his oath of office, when the public prosecutor, as the supervisor of the criminal investigation, conducted the investigative activities personally.

In addition, the public prosecutor bears a specific responsibility for dealing with information originating from the intelligence community when it comes to the fairness of the criminal proceedings. When information obtained by the AIVD is transferred to the law enforcement community, the public prosecutor has the responsibility to decide whether the use of that information does not undermine the fairness of the procedure. As has been explained in [Sect. 2.2.2.4.2](#), this task has been attributed to the national public prosecutor for counterterrorism. Official reports by the AIVD which are to be transferred to the law enforcement community will firstly pass through the national public prosecutor for counterterrorism, who shall decide whether or not it is desirable to start a criminal investigation on the basis of that information. According to Article 38 of the WIV 2002 this especially appointed national public prosecutor is entitled to inspect “all the information on which the notification is based and which is necessary in order to assess the correctness of the notification.” Similar to other officers of the AIVD, this national public prosecutor is bound by secrecy regarding this knowledge. Consequently, the national public prosecutor has an important controlling function regarding the reliability of the information and the fairness of using it as starting information for a criminal investigation, taking into consideration that the possibilities to examine this information and the underlying documents at trial are rather limited or even excluded.

Because of its responsibility to contribute to a procedure in which the rule of law is observed, the PPS has established an additional internal controlling procedure for the application of some of the more intrusive SIT. With regard to some investigative techniques, such as infiltration, pseudo-dealing or serving and the recording of private communication with a technical device, the Board of Procurators General must decide on such use. The Board will only decide on the basis of the advice of the Central Assessment Committee [*Centrale Toetsingscommissie*] (CTC).²⁶⁰ The CTC—founded in 1995—is composed of members of the PPS and members of the police and functions as an internal advisory body for the PPS under the authority of the Board of Procurators General.²⁶¹ The CTC advises the Board of Procurators General on the use of SIT and this advice will be based upon the statutory rules, case law, proportionality, subsidiarity and the risks of harm regarding e.g. operational aspects, safety aspects, criminal procedural consequences and political and international aspects.²⁶² The Board of Procurators General rarely decides differently from the CTC.²⁶³

²⁶⁰ Aanwijzing opsporingsbevoegdheden, *Stcrt.* 2004, 227, para 4.1.2.

²⁶¹ *Ibid.*, para 4.1.1.

²⁶² *Ibid.*, para 4.1.3.

²⁶³ Beijer et al. 2004, 163.

The review by the CTC constitutes an additional safeguard as to the legitimate, proportional and subsidiary use of the investigative technique. The review is a mandatory internal procedure, but is neither legally binding nor a final determination regarding the legitimate use of a special investigative technique. The public prosecutor is not obliged to file documents with regard to advice from the CTC in the dossier as these documents are in principle confidential. Only when these documents concern either incriminating or exculpatory evidence is the public prosecutor obliged to file them in the dossier.²⁶⁴

It can be concluded that the public prosecutor has an important responsibility regarding control over the legitimate exercise of the criminal investigation, especially as a consequence of his supervisory role in the criminal investigation. The public prosecutor shall in this regard oversee the police as to whether they operate within the law, in respect of the fundamental rights of citizens and in observing the principles of proportionality and subsidiarity. Entrusting the public prosecutor with this supervisory responsibility as to the fairness of the criminal investigation can be considered as a consequence of his position as a ‘magistrate’ in the Dutch criminal justice system as this controlling responsibility may even require the public prosecutor to act as a magistrate. In the explanatory memorandum of 1926 the Dutch criminal procedure was described as moderately accusatorial, and this moderation must be sought in the position of the PPS. The PPS has traditionally been given a position as part of the judiciary, which also follows from the position attributed to the public prosecutor in criminal proceedings, such as privileges as a party in the trial process (e.g. the authority to refuse to call witnesses requested by the defense) and the authority to offer a defendant a transaction in the case of minor offenses instead of bringing the case to trial. The presumption of independence and impartiality implied in the position as a magistrate is also important for fulfilling the supervisory role of the public prosecutor during the criminal investigative phase. However, this needs to be put into perspective by also observing that the PPS functions under the responsibility of the Minister of Security and Justice, who has the authority to give general (and in exceptional situations specific) policy instructions to the PPS. Furthermore, the PPS is, especially as a consequence of the current political and societal climate with a focus on strict law enforcement, pressured to work efficiently and to bring as many cases as possible to trial, which further affects the public prosecutor’s position as a magistrate.²⁶⁵ Also the ECtHR has clearly distinguished the procedural position of the public prosecutor from that of a judge, by considering the public prosecutor as a “party” which cannot be attributed the same characteristics of objectivity and impartiality as a judge.²⁶⁶

²⁶⁴ HR 20 June 2000, *NJ* 2000, 502, para 3.3 and 3.4.

²⁶⁵ See also: See e.g. Schalken 2006, 72-73. In recent years the development described in this Article may have been further accelerated under the influence of a societal and political call for safety, which includes the expectation that a tougher prosecution and punishment policy contributes to a safer society. See on this [Chap. 4, Sect. 4.2.3.1](#).

²⁶⁶ ECHR 14 September 2010, App. no. 38224/03 (*Sanoma Uitgevers B.V. v. The Netherlands*), para 93. See also [Sect. 2.1.2](#).

Notwithstanding the fact that the public prosecutor may in the current circumstances generally be inclined to strike a balance in favor of truth-finding, an additional willingness to operate in accordance with his task to guarantee the fairness of the criminal investigation is given by the need to anticipate the trial investigation in which the trial judge will have to examine the fairness of the proceedings as a whole. The consequences of any irregularities during the pre-trial investigation may, however, be limited, as will be explained in more detail in the section dealing with the responsibility of the trial judge for a fair procedure (Sect. 2.3.1.4) and the framework under which he/she exerts such control (Sect. 2.3.2.4.2).

2.3.1.3 The Examining Magistrate

Next to the public prosecutor as the supervisor of the criminal investigation, the examining magistrate has an individual controlling role with regard to the legitimacy, fairness and overall integrity of the criminal investigation. In the CCP of 1926 the examining magistrate was attributed a central position, capable of taking into account both the sword interest of truth-finding and the shield interest of legal protection. As a judge, the examining magistrate can exert independent control with a sufficient detachment from the actual investigation. This position could make him a better watchdog regarding all the objectives of the investigation, where the public prosecutor may be inclined to focus on truth-finding. Hence, the involvement of the examining magistrate in the pre-trial phase was understood as an important guarantee towards the fairness of the pre-trial proceedings.²⁶⁷

The examining magistrate can exert this shield role through *ex ante* judicial control in the course of a criminal investigation when authorizing the use of some of the more intrusive SIT. This means that the shield function of the examining magistrate can only be carried out when the public prosecutor, seeking the use of some of the most intrusive investigative techniques, requests his involvement.²⁶⁸ The examining magistrate shall determine whether the public prosecutor has made an assessment in his order in accordance with the legal requirements. The function of the examining magistrate as a warrant judge is only required for the most intrusive techniques, because this ‘highest’ authority in the hierarchical system of authority during the criminal investigation can be expected to have, as a judge, the highest level of independence and objectivity required to assess all the interests involved before authorizing investigative techniques which seriously interfere with the privacy of citizens.²⁶⁹

²⁶⁷ Van der Meij 2010A, 60.

²⁶⁸ Compare: Van der Meij 2010A, 64-65. Van der Meij concludes that (also) for this reason, the regulation does not provide for a balanced triangular relationship between the examining magistrate, the public prosecutor and the defense. *Ibid.*

²⁶⁹ *Kamerstukken II* 1997/98, 25 877, no. 3, 99.

The Supreme Court formulated the role of the examining magistrate, in relation to the public prosecutor and the trial judge, as a warrant judge for the use of a wiretap on the basis of Article 126m CCP, as follows: 'Initially, it is the responsibility of the public prosecutor to assess whether or not a reasonable suspicion under Article 126m(1) CCP is present and whether there is an urgent investigative need for the recording of telecommunications. For assessing the latter requirement, the principles of proportionality and subsidiarity should be taken into account. Subsequently, it is the task of the examining magistrate to determine whether the statutory requirements are met. Lastly, the trial judge shall examine the legitimacy of the execution of the order for wire-tapping. In the statutory system, when the examining magistrate has authorized the investigative method, this examination on behalf of the trial judge implies the question whether the examining magistrate could reasonably authorize the wire-tapping. Furthermore, the examination of the trial judge covers the execution of the order by the public prosecutor as to the manner in which the public prosecutor has used his authority to order the interception of communications and whether the authorization was otherwise reasonable [translated MHB].'²⁷⁰ It follows from this consideration that the additional control by the examining magistrate prior to using a special investigative technique warrants a more marginal examination by the trial judge as compared to special investigative techniques that can be ordered by the public prosecutor. Furthermore, the control exerted by the examining magistrate before authorizing a wire-tap (or other special investigative techniques for which the authorization of the examining magistrate is required), is limited to an assessment as to whether the statutory requirements are met.

As has been explained in [Sect. 2.2.1.3](#), the position of the examining magistrate in the pre-trial phase has been subject to discussion over the past decades. A brief overview will be given of the developments over, roughly, the past 20 years leading up to the recent intended strengthened position of the examining magistrate during the criminal investigation. Before 1999, the examining magistrate had only a function in the preliminary judicial investigation by having the authority to give law enforcement officers investigative instructions and by having the power to hear the suspect and witnesses. Furthermore, permission from the examining magistrate was already required for some investigative powers, such as the searching of homes and wire-tapping, which, before 1999, could not be provided outside the scope of a preliminary judicial investigation. Hence, the pre-trial investigation could then be divided into two phases: the criminal investigation under the responsibility of the public prosecutor and the preliminary judicial investigation under the responsibility of the examining magistrate. Some investigative methods were exclusively reserved for the preliminary judicial investigation. The preliminary judicial investigation was intended to provide for a stronger safeguard as to the fairness of the pre-trial proceedings, because it can be expected

²⁷⁰ HR 11 October 2005, *NJ* 2006, 625, para 3.5.2. A similar consideration can be found in HR 21 November 2006, *NJ* 2007, 233, ann. Mevis, para 3.4.

that the examining magistrate is impartial and objective to a greater degree than can be expected from the police and the public prosecutor.²⁷¹ However, the examining magistrate was usually not informed about the use of investigative powers which were not statutorily regulated when the public prosecutor requested a preliminary judicial investigation. Consequently, the examining magistrate was unable to completely oversee the scope and nature of the pre-trial investigation.

The Parliamentary Inquiry Commission, in its report of 1996, was rather critical of the controlling role of the examining magistrate and called for improvement. The Commission acknowledged that the authorization of an investigative power was a rather isolated decision, considering that the examining magistrate lacked the required insight into the criminal investigation as a whole, thereby complicating a well-considered assessment of the proportionality and subsidiarity of the investigative method sought.²⁷² Regardless of these criticisms, a significant strengthened position for the examining magistrate was not adopted in the Act on SIT of 1999. After the Act of 1999, the examining magistrate could, outside the scope of the preliminary judicial investigation, fulfill his role as a warrant judge where his authorization was required for the use of the most intrusive SIT. In addition, it was chosen to adopt a strengthened position for the public prosecutor as the supervisor of the criminal investigation.²⁷³ The legislature had thus chosen to only provide the examining magistrate in the criminal investigation with a controlling responsibility for the most intrusive investigative techniques and, apart from that, to keep his controlling role in the criminal investigation, outside the scope of the preliminary judicial investigation, rather limited. This choice was supported by the following three arguments: 1) more frequent involvement of the examining magistrate will harm the strengthened position of the public prosecutor as the supervisor of the criminal investigation; 2) the possibilities for examination are rather limited, because uncovering all information will be against the interest of the investigation and the examination can only occur on the basis of the information provided by the examining magistrate; and, 3) the trial judge already has the possibility to exert control over the legitimate use of investigative powers, which provides the suspect with more legal protection than expanded control on behalf of the examining magistrate.²⁷⁴ Requiring authorization for the investigation of telecommunications and the recording of private communications with a technical device is nevertheless considered necessary, because these SIT directly interfere with a constitutional right: the right to the confidentiality of mail and private communications as protected in Article 13 of the Dutch Constitution.²⁷⁵

²⁷¹ Corstens 2008, 313.

²⁷² Rapport van de Parlementaire Enquêtecommissie Opsporingsmethoden 1996, 389.

²⁷³ *Kamerstukken II* 1998/99, 26 269, no. 4-5 (Rapport Commissie Kalsbeek), 175 and Mevis 2005B, 455.

²⁷⁴ *Kamerstukken II* 1997/98, 25 403, no. 7, 23.

²⁷⁵ *Kamerstukken II* 1997/98, 25 403, no. 7, 24.

With this approach to the position of the examining magistrate in the pre-trial phase in response to the ‘crisis in the criminal investigation’ of the 1990s the debate has not ended. In practice, both the central role of the preliminary judicial investigation and the possibility of fulfilling a meaningful role as a warrant judge have diminished. The public prosecutor rarely requests a preliminary judicial investigation, because of efficiency arguments. As to the function of a warrant judge, the examining magistrate has to rely on the public prosecutor’s obligation to disclose all information available to decide on an authorization.²⁷⁶ Control by the examining magistrate is limited to a marginal examination as to whether the statutory requirements have been met;²⁷⁷ whereas it is not inconceivable that a prosecutor will submit an incomplete dossier to the examining magistrate in order to ensure an authorization for the method intended. According to the final evaluation of the implementation of the Act of 1999 in practice, the task of authorizing SIT covers an important part of the work of the examining magistrate as one district deals with approximately 1000 to more than 7000 requests for wire-taps on a yearly basis, whereas each district only has 1–15 examining magistrates.²⁷⁸ The final evaluation of the Act on SIT also demonstrates that the examining magistrate almost always authorizes the order of the public prosecutor. Due to time constraints as well as a lack of insight into the complete investigation, the actual examination of the documents supporting a request for authorization according to principles such as proportionality and subsidiarity remains rather limited.²⁷⁹

Consequently, the Act to Strengthen the Position of the Examining Magistrate has been introduced.²⁸⁰ Abolishing the preliminary judicial investigation, this Act focuses on the strengthening of the role of the examining magistrate as a supervisor of the criminal investigation by discarding the previous situation where the involvement of the examining magistrate was spread over different procedural stages and statutory frameworks.²⁸¹ Upon the entry into force of this Act, the criminal investigation under the supervision of the public prosecutor is the only investigative pre-trial stage for the purpose of truth-finding in preparation for a criminal prosecution. The role of the examining magistrate during the criminal investigation is to oversee the quality of the criminal investigation, in particular to ensure the legitimate use of investigative powers and the progress, balance and completeness of the criminal investigation.²⁸² For this purpose, the examining magistrate still functions as a warrant judge and the possibilities to conduct

²⁷⁶ Gerechtshof ‘s-Gravenhage 22 February 2005, *LJN* AU0235.

²⁷⁷ Compare: HR 11 October 2005, *NJ* 2006, 625, para 3.5.2 and HR 21 November 2006, *NJ* 2007, 233, ann. Mevis, para 3.4.

²⁷⁸ Beijer et al. 2004, 149–155 and Franken 2006, 267.

²⁷⁹ Franken 2006, 269.

²⁸⁰ *Kamerstukken I* 2010/11, 32177, no. A. Considering that the Act has been adopted by the First Chamber of Parliament, it can be expected, at the time of concluding this book, that it will soon enter into force.

²⁸¹ Van der Meij 2010A, 549.

²⁸² *Kamerstukken II* 2009/10, 32177 no. 3, 8–9.

investigative action at the request of the public prosecutor, at the request of the defense or *ex officio* have been broadened.²⁸³ This latter role is exerted in relation to the function of the examining magistrate to oversee the efficient course of the criminal investigation as regulated in Article 180 CCP. The Act of 2011 is thus intended to strengthen the role of the examining magistrate during the criminal investigation in order to provide for a stronger guarantee with regard to the fairness of the criminal investigation. An important prerequisite for the realization of an actual strengthened position of the examining magistrate is the intended improved information position of the examining magistrate. For this purpose, Article 177a CCP requires that the public prosecutor discloses, in good time, all the information which is relevant for the exercise of the function of the examining magistrate. Furthermore, the examining magistrate may also request additional information on the basis of this provision. Lastly, the examining magistrate may summon the public prosecutor and the defense to attend a procedural meeting in order to discuss the state of affairs in the criminal investigation and to inform them which additional investigative steps shall be taken.²⁸⁴ From the explanatory memorandum, it also follows that this strengthened position of the examining magistrate warrants a more expedient trial phase, where the trial judge may restrict the assessment of the criminal investigative activities to a more marginal examination.²⁸⁵

By the Act on Shielded Witnesses of 2006²⁸⁶ the examining magistrate has obtained an additional important role when it comes to the use of intelligence information in criminal proceedings. Considering the direct relation of this Act with an increase in the use of intelligence in criminal proceedings, especially in terrorism cases, this Act will be dealt with in the next chapter as one of the developments contributing to a shift towards an anticipative criminal investigation.²⁸⁷

2.3.1.4 The Trial Judge

The trial judge exercises control *ex post* over the course of events in the criminal investigation. This control is exerted in the context of an assessment of the right to a fair trial as laid down in Article 6 ECHR, covering the proceedings as a whole. The right to a fair trial under Article 6 and the consequences thereof as developed by the ECHR will play an important role in the determination of the trial judge with regard to the fairness of the procedure. The right to a fair trial can be violated due to events during the criminal investigation as has been explained in

²⁸³ *Kamerstukken II* 2009/10, 32177 no. 3, 10-11.

²⁸⁴ Article 185 CCP, *Kamerstukken II* 2009/10, 32177 no. 3, 17.

²⁸⁵ *Kamerstukken II* 2009/10, 32177 no. 3, 18.

²⁸⁶ Act of 18 September 2006, *Stb.* 2006, 460.

²⁸⁷ See [Chap. 3, Sect. 3.3.2.](#)

Sect. 2.1.3.3. As also explained in **Sect. 2.1.3.3** an investigation in violation of statutory law or in violation of another right guaranteed in the ECHR, such as Article 8 ECHR, does not automatically result in a violation of Article 6 ECHR.²⁸⁸ In order to determine whether the right to a fair trial has been violated, the procedure as a whole is taken into account, which includes the possibility to rectify or compensate illegitimate actions that have occurred during the criminal investigation. The exact implications of an examination with regard to the fairness of the proceedings by the domestic judge are, as repeatedly emphasized by the ECtHR, a matter of evidentiary law as regulated in domestic law.²⁸⁹ Hence, the assessment of the trial judge as to whether the right to a fair trial has been violated and the question whether such violation shall result in procedural sanctions will occur within the framework of evidence which has been illegitimately obtained as provided in the Dutch CCP (Article 359a CCP) and as interpreted in the case law. This framework will be dealt with in **Sect. 2.3.2.4.2** as an element adopted in the CCP regulating the criminal investigation by providing the remedies against the illegitimate use of criminal investigative powers.

For this section it is sufficient to note that the *ex post* control function of the trial judge with regard to the course of events during the criminal investigation will be exercised within the context of Article 359a CCP with the possibility to offer procedural compensation in the form of one of the remedies enumerated in Article 359a CCP (barring the prosecution, the exclusion of evidence or mitigating the sentence). This decision will be made in light of the right to a fair trial, and is thus dependent on whether or not imposing a procedural sanction can compensate for any unfairness in the criminal investigative phase and whether it will render the procedure as a whole fair.

2.3.1.5 The Position of the Suspect

The suspect is already entitled to certain forms of procedural protection during the pre-trial phase, including during the covert criminal investigation. These forms of protection are embedded in the system of criminal investigation and have a restrictive function on the power of the state to apply investigative methods against its citizens. During the criminal investigation with an inquisitorial character, the suspect is, however, primarily the subject of the investigation. The suspect's rights during the pre-arrest phase are restricted to the right to be informed about any use of investigative powers against him, as enabled by the duty of notification. This right can however be postponed until the interest of the investigation is not obstructed by disclosure. This means that in practice the suspect will not be aware

²⁸⁸ See e.g. ECHR 12 May 2000, App. no. 35394/97 (*Khan v. The United Kingdom*), para 34. See also **Sect. 2.1.3.3**.

²⁸⁹ E.g.: ECHR 24 November 1994, App. no. 13972/88 (*Imbrioscia v. Switzerland*), para 34. See also **Sect. 2.1.3.3**.

of any investigation against him until his arrest or first police interrogation. Consequently, during the criminal investigation it is exclusively the responsibility of the police, the public prosecutor and the examining magistrate also to take the position of the suspect into account at all times. This concerns an independent obligation, as well as the consequence of the prospect of a subsequent criminal trial where the defense can challenge the fairness of the procedure before the trial judge, as has been described in the preceding sub-sections.

As has already been briefly mentioned in the introductory section of this chapter, the defense has a possibility to contribute to truth-finding if there are doubts about the completeness of the investigation conducted on behalf of the PPS (Article 182 CCP).²⁹⁰ The suspect can, when interrogated with regard to a criminal offense or when already charged, request the examining magistrate to conduct specific investigative activities. These possibilities for the defense to request the involvement of the examining magistrate for specific investigative action have been expanded by the Act on Strengthening the Position of the Examining Magistrate of 2011.²⁹¹ According to the explanatory memorandum, a side-effect of the expanded possibilities for the suspect/defense during the pre-trial phase will be that the trial judge may deal with the admissibility of requests for complementary investigative action during trial more restrictively.²⁹² Nevertheless, considering that the suspect will not normally be aware of any investigation against him until his arrest or, in less serious cases, until the first police interrogation, the involvement of the defense during the criminal investigation on the basis of these provisions is in the context of this project, being limited to covert criminal investigation, of little relevance.

In particular, the right to a fair trial as guaranteed in Article 6 ECHR is important for the position of the suspect in relation to the fairness of the criminal investigation. The suspect can rely on the forms of protection contained in Article 6 ECHR as a guarantee towards the fairness of the criminal proceedings as a whole and may challenge, in the context of a criminal trial, the fairness of the investigative action against him. Nevertheless, as already explained in the previous sub-section and in [Sect. 2.1.3.3](#), the right to a fair trial is not automatically violated when during the domestic procedure evidence has been obtained in a manner that is incompatible with a provision of the ECHR (most probably Article 8). Moreover, the ECtHR has repeatedly clarified that it is not its task to determine rules for the consequences that should follow when evidence has been unlawfully obtained. Hence, when the suspect challenges the legitimacy of the investigative activities against him, the judge, on the basis of Article 359a CCP, will assess the course of events of the criminal investigation. The most important prerequisite for

²⁹⁰ *Kamerstukken I* 2010/11, 32177, no. A.

²⁹¹ Until the entry into force of the Act on Strengthening the Position of the Examining Magistrate, the suspect could under Article 36a-36e CCP request the examining magistrate to investigate in the context of the preliminary judicial investigation some specified aspects.

²⁹² As suggested in the explanatory memorandum of this Act, *Kamerstukken II* 2009/10, 32177 no. 3, 18.

the defense during the criminal investigation, in order to be able to challenge the fairness of the procedure and the legitimacy of the use of investigative powers, is to have access to all reports concerning the criminal investigation. This is facilitated by the duty to compile records under Article 152 CCP and by disclosure obligations. The defense must be able to rely on the information in the dossier and have the opportunity to challenge the correctness of this information.

The duty to compile records applies to all reports that are relevant. According to the Supreme Court, reports are relevant when they may affect the evidence and shall thus concern all incriminating and exonerating information which is available.²⁹³ This relevance rule corresponds with the approach of the ECtHR, determining that it is a “requirement of fairness under paragraph 1 of Article 6 (...) that the prosecution authorities disclose to the defence all material evidence for or against the accused.”²⁹⁴ According to Article 126aa CCP the public prosecutor shall disclose the reports on the use of special investigative techniques to the dossier. The fourth section of this Article determines that this reporting applies to all uses of special investigative techniques in a specific criminal investigation, also when the use of SIT has not produced any relevant results.²⁹⁵

To take advantage of the duty to compile records, the suspect must be able to take note of the contents of the dossier. The suspect has the right to have all the contents of the dossier disclosed at the latest when the pre-trial investigation has been closed (Article 30-34 CCP). The disclosure to the defense must take place as soon as the interest of the investigation is not impeded by revealing what is detected.²⁹⁶ The disclosure of relevant reports may be withheld when the exposure of the information to the public may hinder future investigative activities. The judge will need to balance the interest of disclosure against the interest of secrecy.²⁹⁷ For example, when the disclosure reveals information about an element of a criminal organization and the investigation of the remainder of the criminal organization will continue, the interest of the investigation allows the postponement of the disclosure. Other conceivable examples are a cross-border investigation or any other ongoing investigation which might be obstructed by revealing the information.²⁹⁸ According to Article 33 CCP, the latest possibility for disclosing information is when the summons is served on the suspect. Because this obligation is sometimes difficult to fulfill due to the pressing interests of an ongoing criminal investigation, in the case law a rather flexible approach has been adopted towards compliance with this last filing possibility.²⁹⁹ Ultimately, the trial judge has the

²⁹³ HR 7 May 1996, *NJ* 1996, 687 ann. Sch, para 5.9.

²⁹⁴ ECHR 16 December 1992, App. no. 13071/87 (*Edwards v. The United Kingdom*), para 36.

²⁹⁵ See Corstens 2008, 249.

²⁹⁶ Article 126aa(3) CCP.

²⁹⁷ Corstens 2008, 249.

²⁹⁸ *Kamerstukken II* 1996/97, 25 403, no. 3, 84.

²⁹⁹ Buruma 2001, 28.

authority to order the disclosure of information to the dossier. He can also decide to order disclosure at the request of the defendant.³⁰⁰

According to the ECHR, it is decisive for meeting the disclosure obligations whether the dossier (in this particular case there was no dossier, considering that the scope of the disclosure obligation of the prosecutor under English law was at issue) contains “all material evidence for or against the accused”.³⁰¹ Also, the suspect must eventually have access to the same information as the trial judge.³⁰² According to the ECHR case of *Fouchier*, it is essential that the suspect at least receives the information regarding the activities of the criminal investigation and the prosecution against him insofar as the information can influence the suspect’s position in the procedure.³⁰³

2.3.1.6 The Position of Other Subjects of Criminal Investigative Activities

Persons can become the subject of the criminal investigation without ever obtaining the status of a suspect or without ever being criminally prosecuted. The use of investigative powers is not limited to a suspect, but is aimed at the clarification of a reasonable suspicion of a crime. Consequently, the application of special investigative techniques may also result in the gathering of information regarding persons that are never prosecuted. Especially in proactive investigations, groups of persons may be investigated, while only some of them will become suspects and will be prosecuted.

According to Article 13 ECHR everyone is entitled to an effective remedy once his or her rights as protected by the ECHR have been violated. In line with this, a duty of notification has been adopted in order to prevent persons remaining unaware of the fact that they have been subjected to an investigation and, consequently, being deprived of a remedy to challenge the legitimacy of the use of special investigative techniques against them. The duty of notification regarding the use of special investigative techniques has been adopted in Article 126bb(1): the public prosecutor provides written notification to any persons involved concerning the use of special investigative techniques as soon as the interest of the investigation is not obstructed by the notification. Section 2 of Article 126bb provides a definition of persons who are ‘involved’: (a) persons against whom the SIT was used; (b) the user of telecommunications or of technical devices used for telecommunications where wire-tapping has occurred; and (c) the rightful owner of a dwelling used for the application of SIT.³⁰⁴ The duty of notification in Article 126bb CCP is complementary to the situation where someone is informed, in the

³⁰⁰ Article 315 and 326 CCP.

³⁰¹ ECHR 16 December 1992, App. no. 13071/87 (*Edwards v. The United Kingdom*), para 36.

³⁰² Buruma 2001, 27.

³⁰³ Myjer 1997, 742.

³⁰⁴ Article 126bb(2) CCP.

context of criminal proceedings, of the duty to disclose under Article 126aa (1) and (4) CCP and has thus been particularly adopted so as to offer persons other than the suspect the possibility to challenge the legitimacy of the use of SIT against them.³⁰⁵ Sometimes, also persons who are not individualized will be part of the information obtained through the technique. In such a situation the investigative technique is not applied against those persons and the duty of notification does not apply to them.³⁰⁶ The notification will take place when the interest of the investigation is not prejudiced by the notification. When the person involved is already aware that an investigative technique has been applied, the government is not indemnified from its obligation to notify. An exception to the duty of notification applies when the notification is practically impossible, for example when the address of the person involved is unknown.³⁰⁷

Persons who have been involved in criminal investigative activities may have experienced significant interferences with their private life. The duty of notification is an important procedural requirement enabling persons to challenge the legitimacy of such investigative activities and provide them with an effective remedy as guaranteed by Article 13 ECHR. Article 13 ECHR requires that there should be an effective remedy before a national authority in case of an alleged violation of one of the rights protected in the convention. This means that one should have the opportunity to challenge the legitimate use of an investigative power that has interfered with their private life. In *Kruslin/Huvig v. France* the Court determined that the regulation of far-reaching investigative powers such as wire-tapping should include procedural safeguards for the persons involved to have the opportunity to challenge the legitimacy of the wire-tap used against them.³⁰⁸ In the *Klass* judgment the Court determined that the German provision that “the person concerned must be informed after the termination of the surveillance measures as soon as notification can be made without jeopardizing the purpose of the restriction” is a regulation which is in conformity with Article 13 ECHR.³⁰⁹ This provision is similar to the Dutch provision of Article 126bb CCP. After notification, persons prosecuted may file a complaint with the National Ombudsman or initiate civil proceedings in order to seek damages for the illegitimate use of criminal investigative powers. However, there are no additional provisions that facilitate an effective remedy after the notification, which might raise doubts about the effectiveness in practice.³¹⁰

³⁰⁵ Article 126bb(3) CCP.

³⁰⁶ *Kamerstukken II* 1996/97, 25 403, no. 3, 85.

³⁰⁷ Article 126bb (1) CCP. See in detail on the manner in which the duty of notification shall be exerted, including the possible exceptions: ‘Aanwijzing opsporingsbevoegdheden’, *Stcrt* 2011, no. 3240, under 5.4.

³⁰⁸ ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huvig v. France*).

³⁰⁹ ECHR 6 September 1978, App. no. 5029/71 (*Klass and others v. Germany*), para 71-72.

³¹⁰ See: HR 21 November 2006, *NJ* 2007, 233, ann. Mevis, annotation para 2. See also: Baaijens-van Geloven and Simmelink 2002, 588 and 593.

An evaluation of the use of SIT after the entry into force of the Act of 1999 regulating these techniques demonstrates that, in practice, the duty of notification is usually not observed. It appears that the most important reason for not notifying is that the investigative technique is usually applied against a suspect who will be notified automatically as a result of compliance with the duty to compile records. The second reason for non-observance is that the notification would undermine the interest of the investigation.³¹¹ The interest of the investigation can also concern, similar to refraining from observing the duty to compile records, the interests of other criminal investigations, for example in the case of different investigations into a criminal organization. The Board of Procurators General has now urged all chief public prosecutors in the different district public prosecutor's offices to comply more effectively with the duty of notification, by affirming the importance of this protecting duty within the system of special investigative techniques.³¹²

2.3.2 The Protective Elements in the System of Criminal Investigation

The regulation of the criminal investigation in the criminal procedural law of the Netherlands is a consequence of both the fundamental rights and principles addressed in [Sect. 2.1.3](#) and the specific choices made in the regulation of the criminal investigation in the CCP. This section will address the elements in the regulation of the criminal investigation that serve a protective goal. Firstly, the specific consequences of the protection of privacy for the regulation of criminal investigative powers will be described. These consequences follow from the principle of legality and from the interpretation of Article 8 ECHR ([Sect. 2.3.2.1](#)). Furthermore, the definition of a criminal investigation and, consequently, the demarcation from other investigative forms serves an important protective function, considering that the principle of legality and criminal procedural guarantees only apply to investigative activities that can be defined as a criminal investigation. This demarcation of the criminal investigative phase will be addressed in [Sect. 2.3.2.2](#). The chapter will then turn to the specific regulation of the use of criminal investigative powers within the criminal investigation. For that purpose three investigative domains can be identified in which a different 'threshold of suspicion' as a triggering mechanism for the use of investigative powers is applied. [Section 2.3.2.3](#) extensively deals with the different applicable triggering mechanisms and the central role of the reasonable suspicion threshold. Also any other levels of suspicion applicable to specific investigative techniques and additional protective restraints will be dealt with. Lastly, additional protective elements

³¹¹ Beijer et al. 2004, 145.

³¹² *Kamerstukken II* 2006/07, 29 940, no. 4, 1-2 (Letter of the Minister of Justice regarding the evaluation of the Act on SIT).

adopted in the CCP—the duty of reporting and procedural remedies—will be addressed in [Sect. 2.3.2.4](#).

2.3.2.1 Regulation Following the Principle of Legality and the Right to Respect for Private Life

As has been explained in [Sects. 2.1.3.1](#) and [2.1.3.2](#), the principle of legality and the right to respect for private life require that the use of investigative powers that infringe upon privacy rights is regulated in the manner prescribed by the principle of legality under Article 1 CCP and meeting certain standards following from Article 8 ECHR and Article 10 Constitution. The principle of legality and the right to respect for private life are clearly related when it comes to the regulation of criminal investigative powers that interfere with privacy rights. Already in 1838, when the first Dutch Code of Criminal Procedure was adopted,³¹³ the underlying principle of the then adopted Code of Criminal Procedure was that for every governmental power interfering with fundamental rights as protected by the Constitution a basis in law must be established.³¹⁴ The main purpose of adopting the principle of legality in Article 1 CCP was to relate the provisions in the CCP to the protection of fundamental liberties in the Constitution. In that way the infringements of fundamental liberties by state authorities as provided for in the CCP obtained their justification with respect to the protection elements contained the Constitution through Article 1 CCP.³¹⁵ Also the constitutional provision itself (Article 10 Constitution) requires an Act of Parliament for establishing limitations to the right to private life. Article 8 ECHR, providing for the right to respect for one's private life, also only accepts limitations to this right in accordance with the law. In the Netherlands the requirement 'in accordance with the law' obliges the legislature to provide for codified law by an Act of Parliament.

Already in 1838 the Dutch criminal law specialist De Bosch Kemper recognized the importance of respect for private life in exercising powers under criminal law. He considered the protection against any arbitrary use of criminal procedural powers which disrespected individual liberty as one of the basic requirements of the law. According to De Bosch Kemper, the limits to the use of criminal procedural powers that interfere with private life must be provided in the law, while these provisions are only exceptions to the general rule that the government must respect the private life of its citizens.³¹⁶ From the wording used in the explanatory memorandum of the CCP of 1913-1914 it can be derived that in designing the CCP the 'paradox situation has been taken into account that in a *Rechtsstaat* it is

³¹³ Although based to a large extent upon the French Code d'Instruction Criminelle, used in the Netherlands for the preceding 27 years.

³¹⁴ As to J. de Bosch Kemper (1838): Simmelink 1987, 39-40.

³¹⁵ Simmelink 1987, 40 and 41, Berkhout-van Poelgeest 2001, 30.

³¹⁶ J. de Bosch Kemper (1838), cited in Simmelink 1987, 39.

inevitable that the fundamental rights of some are restricted in furtherance of the rights and liberties of others.³¹⁷ Whereas fundamental rights are the core of the *Rechtsstaat*, it is necessary to restrict these rights when certain criminal procedural measures are needed in order to be able to establish the truth in favor of those whose rights have been violated as victims of crime or of crime-affected society in general. Some investigative powers had already been explicitly regulated in the CCP, while subjecting these methods to certain conditions.

Since the entry into force of the Code of Criminal Procedure of 1926 the right to respect for private life has gained in importance, which follows from the relatively recent adoption of this right in the Dutch Constitution (by the amendment of the Constitution in 1983). Moreover, the European Court of Human Rights has promulgated an approach in which the right to private life was given increasing importance over the years. At the same time, many new investigative powers with a more intrusive character have been developed as a consequence of technological developments, whereas the need for such measures was also fed by the increasing complexity of criminality, often in the context of a criminal organization.

This section will first turn to the general rules for the regulation of criminal investigative powers following from the ECtHR's interpretation of the restrictive clause of Article 8 ECHR. Section 2.1.3.2.1 has already described the scope of Article 8 ECHR as well as the interpretation of the different elements of the restrictive clause of Article 8 ECHR. These findings will not be repeated here. Instead, the focus will be particularly on the interpretation of the requirements of 'foreseeability' and being 'necessary in a democratic society' as these two elements of the restrictive clause of Article 8 ECHR set specific standards that the regulation of criminal investigative powers in the Netherlands needs to meet. Secondly, Sect. 2.3.2.1.2 will deal with the particular requirements for regulating criminal investigative powers in the Netherlands, where the regulation shall observe not only the requirements of the restrictive clause of Article 8 ECHR but also the particular requirements following from Article 10 Constitution and the principle of legality.

2.3.2.1.1 The Requirements of the Restrictive Clause of Article 8 ECHR

The principle of legality and respect for the right to private life are thus complementary with regard to the regulation of the criminal investigation. Both protect citizens against arbitrary interference by the state with their private life; they provide them with legal protection; and they guarantee equality for the law. A basis in law should therefore provide for a clear regulation of the circumstances and conditions under which the use of criminal powers by the government is permitted.³¹⁸ In addition, the interpretation of Article 8 ECHR has resulted in

³¹⁷ See: Knigge and Kwakman 2001, 181.

³¹⁸ *Ibid.*, 311.

specific requirements with regard to the quality of the law.³¹⁹ The law, established by Act of Parliament as a requirement under the Dutch Constitution, shall protect against arbitrary interferences with the right to respect for private life by only allowing restrictions to this right when the basis in law is adequately accessible, to a sufficient extent, and foreseeable to the person concerned.³²⁰ The restriction must also be necessary in a democratic society. The ECtHR has further developed these requirements in its case law, providing for conditions that domestic legislation on investigative powers that interfere with the right to respect for private life must meet in order to be compatible with Article 8 ECHR.

The requirement of accessibility has been explained as requiring that someone can relatively easily take note of the legal provision providing for a restriction on his or her right to private life. Someone “must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.”³²¹ When the applicable law has been published, the law is considered accessible.³²² Hence, this requirement is generally met in the Dutch legal system, considering that the principle of legality provides that criminal procedure has to be established by an Act of Parliament, which will be published in the ‘State’s bulletin of acts, orders and decrees’.

With regard to the regulation of criminal investigative powers, especially the requirement of foreseeability imposes specific conditions.³²³ The foreseeability of a specific interference must be considered in relation to the government’s specific measure which results in such interference. For example, for the interception of telecommunications it cannot be required that a person must be able to foresee when his communications are being intercepted since that gives this person the opportunity to adjust his conduct. Foreseeability in this regard means that a citizen must be aware of in which circumstances and under what conditions the government is authorized to use such (secret) investigative powers.³²⁴ Furthermore, legislation must at least provide for a “minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society.”³²⁵ This

³¹⁹ See Sect. 2.1.3.2.1.

³²⁰ ECHR 26 April 1979, App. no. 6538/74 (*Sunday Times v. The United Kingdom*), para 49; ECHR 25 March 1998, case 13/1997/797/1000 (*Kopp v. Switzerland*), para 55; ECHR 16 February 2000, App. no. 27798/95 (*Amann v. Switzerland*), para 50 (and 56); ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huvig v. France*), para 30/29). See in more detail Sect. 2.1.3.2.1.

³²¹ ECHR 26 April 1979, App. no. 6538/74 (*Sunday Times v. The United Kingdom*), para 49.

³²² ECHR 30 March 1989, App. no. 10461/83 (*Chapell v. The United Kingdom*), para 56.

³²³ See ECHR 29 June 2006, App. no. 54934/00 (*Weber and Saravia v. Germany*) (admissibility decision), para 93-94 and ECHR 1 July 2008, App. no. 58243/00 (*Liberty and others v. The United Kingdom*), para 62, for a summary of the Court’s case law on the interpretation of and the conditions following from the requirement of foreseeability.

³²⁴ ECHR 2 August 1984, App. no. 8691/79 (*Malone v. The United Kingdom*), para 67 and ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huvig v. France*), para 30/29.

³²⁵ ECHR 2 August 1984, App. no. 8691/79 (*Malone v. The United Kingdom*), para 79.

means that the basis in law providing for the power to use covert surveillance techniques must provide “adequate protection against arbitrary interference with Article 8 rights” and provide “adequate and effective guarantees against abuse.”³²⁶ Nevertheless, the requirement of foreseeability does not mean that the law must be elaborated in detail, because that “might give rise to excessive rigidity, and the law must be able to keep pace with changing circumstances.”³²⁷ The foreseeability requirement may be related in that sense to the principle of legality as laid down in Article 7 of the Convention (see on the principle of legality [Sect. 2.1.3.1](#)). “[H]owever clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation.”³²⁸

What basis of law is considered to be of sufficient quality to be in accordance with Article 8(2), depends, again, on all the circumstances of the specific case, such as the “nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the kind of remedy provided in national law”³²⁹ and, elsewhere, “the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.”³³⁰ Dependent on the nature of the interference with the right to respect for private life and the consequences of this interference, the ECHR requires either more or less from the substantive precision of a specific basis in domestic law.³³¹ The Court seems to impose higher standards for covert investigative techniques: “[e]specially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident.”³³² This may be illustrated by cases where the Court has assessed the compatibility of the basis in law for electronic communications.³³³ For example, in *Kruslin/Huwig v. France* the Court set strict requirements for tapping phone communications without permission.³³⁴ The tapping of telephone communications

³²⁶ See e.g. ECHR 2 September 2010, App. no. 35623/05 (*Uzun v. Germany*), para 63.

³²⁷ ECHR 23 September 1998, App. no. 72/1997/856/1065 (*McLeod v. The United Kingdom*), para 41, and ECHR 26 April 1979, App. no. 6538/74 (*Sunday Times v. The United Kingdom*), para 49.

³²⁸ ECHR 2 September 2010, App. no. 35623/05 (*Uzun v. Germany*), para 62.

³²⁹ ECHR 2 September 2010, App. no. 35623/05 (*Uzun v. Germany*), para 63.

³³⁰ ECHR 12 January 2010, App. no. 4158/05 (*Gillan and Quinton v. The United Kingdom*), para 77.

³³¹ ECHR 2 August 1984, App. no. 8691/79 (*Malone v. The United Kingdom*), para 68.

³³² ECHR 2 August 1984, App. no. 8691/79 (*Malone v. The United Kingdom*), para 67 and ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huwig v. France*), para 30/29.

³³³ E.g. ECHR 2 August 1984, App. no. 8691/79 (*Malone v. The United Kingdom*), ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huwig v. France*), ECHR 29 June 2006, App. no. 54934/00 (*Weber and Saravia v. Germany*) (admissibility decision) and ECHR 1 July 2008, App. no. 58243/00 (*Liberty and others v. The United Kingdom*).

³³⁴ ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huwig v. France*), para 33/32. ECHR 25 March 1998, case 13/1997/797/1000 (*Kopp v. Switzerland*).

is considered to be such serious interference—although understandably necessary for the interest of the investigation—that using this investigative method is only permitted if it is accompanied by sufficient guarantees for the person(s) involved. According to the Court it is “essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated.”³³⁵ In *Weber and Saravia* the Court—after summarizing the general considerations in its case law regarding the requirement of foreseeability in the field of electronic surveillance—formulated the specific minimum safeguards that should be included in statutory law for the investigative power of wire-tapping:

“the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed.”³³⁶

In contrast, the balancing of less serious interference with privacy against the interests of the investigation in the case of *Murray* gave rise to imposing less strict requirements for the quality of the law. In *Murray* investigative activities such as the recording of personal details, including a photograph having been taken without consent that did not have an explicit basis in the law, were ‘in accordance with the law’ as they could inexplicitly be derived from the legal basis of the more intrusive powers of arrest and detention. The less intrusive investigative actions were considered necessary for the successful exertion of the powers to arrest and detain.³³⁷ A similar conclusion was reached in *Uzun v. Germany* where the GPS surveillance of movements in public was not considered to interfere with private life to the same extent as the electronic surveillance of telecommunications, for which reason “more general principles on adequate protection against arbitrary interference with Article 8 rights” applies. For this reason the provision that constituted the basis for the GPS surveillance, stating that “other special technical means intended for the purpose of surveillance may be used to investigate the facts of the case or to detect the perpetrator’s whereabouts if the investigation concerns a criminal offence of considerable gravity”, was sufficiently foreseeable and with this conclusion the Court also took into account additional safeguards against arbitrariness such as the fact that the principle of proportionality had been taken into account and an *ex post* judicial review was in place.³³⁸

³³⁵ ECHR 29 June 2006, App. no. 54934/00 (*Weber and Saravia v. Germany*) (admissibility decision), para 93 and ECHR 1 July 2008, App. no. 58243/00 (*Liberty and others v. The United Kingdom*), para 62.

³³⁶ Internal citations omitted, ECHR 29 June 2006, App. no. 54934/00 (*Weber and Saravia v. Germany*) (admissibility decision), para 95. See also: ECHR 1 July 2008, App. no. 58243/00 (*Liberty and others v. The United Kingdom*), para 62.

³³⁷ ECHR 28 October 1994, App. no. 14310/88 (*Murray v. The United Kingdom*), para 88.

³³⁸ ECHR 2 September 2010, App. no. 35623/05 (*Uzun v. Germany*), para 29 and 68-74.

The second requirement which is relevant for the regulation of criminal investigative powers and that follows from the restrictive clause of Article 8 ECHR concerns the requirement that the interference must be necessary in a democratic society in order to be legitimate. ‘Necessary in a democratic society’ is a condition which requires a legitimate aim for the interference and, furthermore, that the “interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.”³³⁹ The possible legitimate aims are enumerated in section 2 of Article 8: the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and liberties of others. For example, in the ECHR case of *Lüdi v. Switzerland* the wire-tapping of the defendant’s private communications was permitted because Swiss law establishes a basis for the use of this method in situations where there is a “good reason to believe that criminal offenses are about to be committed.” The goal of this law is the prevention of crime, which the Court considers as a necessity in a democratic society. This meets the requirements of Article 8(2) and, with that, justifies the limitation on section 1 of Article 8.³⁴⁰ The requirement of ‘necessary in a democratic society’ is a very important requirement that restricts the possibility for states to adopt legislation that provides bases for interfering with Convention rights. Moreover, it reflects the idea that the state model of democracy is the only possible state organization which is compatible with the Convention.³⁴¹ However, the Court primarily leaves a margin of appreciation to the states in this regard and exerts only a marginal examination itself. Interfering with the right to privacy is necessary in a democratic society when there is (in addition to one of the enumerated legitimate aims) a pressing social need for the interfering activities, while the interference must be relevant for achieving the intended aim and it must be proportionate to the legitimate aim pursued.³⁴² Furthermore, the requirement of ‘necessity’ in fact implies an assessment of the proportionality and subsidiarity of the restriction. The interference shall not be of such a nature that the essence of the right to respect for private life is undermined, and it must be proportionate to the intended aim. An infringement by a public authority will not be legitimate if the intended aim can be achieved by less intrusive means.³⁴³ Also when a state uses its power to exert the positive duty to protect the lives of citizens under Article 2 ECHR—for example, in order to prevent a terrorist attack—and interferes for that purpose with the right to private life as protected by Article 8 ECHR, such

³³⁹ ECHR 26 March 1987, App. no. 9248/81 (*Leander v. Sweden*), para 58.

³⁴⁰ ECHR 15 June 1992, App. no. 12433/86 (*Lüdi v. Switzerland*), para 39. Furthermore, the Court ruled in this case that the use of an undercover agent, who observed the defendant committing a drugs crime, did not violate the privacy of the defendant (Article 8(1)) because the defendant should have been aware of the risk of being observed in that situation. *Ibid.*, para 40.

³⁴¹ Loof 2005, 211.

³⁴² See e.g. ECHR 23 September 1998, App. no. 72/1997/856/1065 (*McLeod v. The United Kingdom*), para 52. See in general: Arai 2006, 340-341.

³⁴³ Loof 2005, 213-214.

interference must meet the requirements for a legitimate restriction of Article 8 ECHR and must therefore be proportionate in order to be necessary in a democratic society.³⁴⁴

2.3.2.1.2 The Requirements of the Principle of Legality and the Right to Respect for Private Life in the Regulation of Criminal Investigative Powers

As has been explained in the section dealing with the legal bases providing for truth-finding instruments, different requirements apply with regard to the precision of the legal basis, which depends on the intrusiveness of the investigative powers in question. Until the mid-1990s the Supreme Court accepted that Articles providing for a general setting of tasks, such as Article 2 of the Police Act 1993 and Articles 141/142 CCP, could serve as a sufficient legal basis for investigative powers interfering with privacy rights. One of the main causes of the so-called ‘crisis in the criminal investigation’ was that investigative powers were widely applied, while a precise regulation in the law was lacking.³⁴⁵ It was clearly questionable whether these Articles provided, in all circumstances, a sufficient basis in the law within the meaning of Article 8 ECHR.

Around the same time the Supreme Court slightly changed its position by determining in the case of *Zwolsman* that Article 2 of the Police Act 1993 did not sufficiently meet the requirement of being ‘in accordance with the law’ when the use of the investigative power results in more serious interference with the right to respect for private life.³⁴⁶ However, when the interference is rather limited Article 2 Police Act 1993 and Article 141/142 CCP can serve as the legitimate basis in law.³⁴⁷ Decisive for answering the question whether or not a specific basis in law is required for the use of an investigative power is thus the extent to which the power interferes with private life. For example, the Supreme Court considered that sifting through discarded garbage is a measure that does not infringe on privacy, since it does not constitute a situation in which someone can have a reasonable expectation that his private life will be respected.³⁴⁸ The same view was taken concerning, e.g., observation in a public place.³⁴⁹

The ECtHR (*Malone*) generally requires that (any) legal basis for a criminal investigative power providing for discretion for investigative officers provides for “a measure of legal protection against arbitrary interferences by public authorities

³⁴⁴ See also Chap. 1, Sect. 1.3.2.

³⁴⁵ Rapport van de Parlementaire Enquêtecommissie Opsporingsmethoden 1996, 419-420.

³⁴⁶ HR 19 December 1995, *NJ* 1996, 249, para 6.4.4 and 6.4.5. Although, in this case, the Supreme Court made no explicit reference to either Article 8 ECHR or Article 10 of the Constitution, its judgment can clearly be seen in relation to the forms of protection provided in these Articles.

³⁴⁷ HR 19 December 1995, *NJ* 1996, 249, para 6.3.2 and 6.4.5.

³⁴⁸ HR 19 December 1995, *NJ* 1996, 249, para 8.3.

³⁴⁹ HR 2 June 1998, *NJ* 1998, 783, para 6.2, HR 13 June 1995, *NJ* 1995, 684, HR 11 October 1986, *NJ* 1988, 511, para 6.3.

with the rights safeguarded in Article 8(1).”³⁵⁰ Furthermore: “a law which confers a discretion must indicate the scope of the discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law.” The Court continued by stating that: “[c]onsequently, the law must indicate the scope of any of such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.”³⁵¹ A rather wide scope of discretion may be attributed to investigative officers, but not for the use of all investigative powers. As addressed in the previous section, the degree of precision depends on all the circumstances of the case, and in particular on the nature of the investigative power concerned and, consequently, on the nature of the interference caused by using the investigative power. On that basis, the Court decided in the case of *Malone* that the wide discretion afforded to the public authorities in using secret surveillance of communications was not in compliance with the requirement of being ‘in accordance with the law’ as contained in Article 8 ECHR.³⁵²

The Act on SIT anticipates these requirements of Article 8 ECHR and the principle of legality by establishing precise regulations for investigative techniques that interfere in most circumstances with the privacy of the persons involved.³⁵³ The adoption of the Act has been a critical turning point in the regulation of a criminal investigation. The basic assumption of this Act was to make the criminal investigation sound and controllable. From now on, SIT that interfere with rights and liberties can only be applied, as the principle of legality and the protection of the right to private life prescribe in criminal procedural law, on the basis of and in accordance with specific conditions provided by law. The government formulated three objectives that the Act was deemed to achieve: (1) regulation by creating a statutory basis in the CCP for SIT; (2) furthering and guaranteeing a legitimate criminal investigation, by establishing hierarchical control primarily by the public prosecutor as well as furthering transparency regarding the use of investigative techniques; and (3) the effective investigation of (organized) crime.³⁵⁴ The regulation provides for the circumstances in which the use of investigative techniques is permitted and under what conditions this use must occur. The established system thus importantly strengthens the protection against arbitrary governmental interference by including the right to respect for private life, especially in comparison with the situation before 1999. This does not mean that specifically regulated

³⁵⁰ ECHR 2 August 1984, App. no. 8691/79 (*Malone v. The United Kingdom*), para 67. Repeated in: ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huvig v. France*), para 30/29.

³⁵¹ ECHR 2 August 1984, App. no. 8691/79 (*Malone v. The United Kingdom*), para 68.

³⁵² *Ibid.*, para 79.

³⁵³ *Stb.* 1999, 245.

³⁵⁴ Beijer et al. 2004, 29. See also the explanatory memorandum in which codification, enhanced hierarchical supervision and controllability were formulated as the main objectives of the new Act. *Kamerstukken II* 1997/98, 25 403, no. 3, 3.

powers leave no room for different interpretations. Without interpreting the law by analogy, it is the task of the judiciary to fill such gaps in the law in accordance with fundamental principles of law (such as proportionality and subsidiarity) and in accordance with the original intent of the legislature in creating that specific regulation.³⁵⁵

Also the preliminary investigation has been given a more precise regulation in the CCP. Although the activities conducted in a preliminary investigation cannot entail one of the regulated SIT, they do concern the collection of personal details concerning persons who are not (yet) suspected of a crime. The character of the specific investigative activities conducted during the preliminary investigation cannot be considered as very intrusive for the right to privacy. However, the nature and scope of the investigation, that can be characterized as nosing through the personal details of members of a 'group' or 'branch' of society, nevertheless have serious consequences for the private lives of the people involved. For this reason, the legislature decided to establish a more specific basis in law for these preliminary investigative activities, rather than deriving the power to conduct these activities from Article 2 of the Police Act 1993.³⁵⁶ To compensate for the seriousness of the implications for the private lives of persons not (yet) suspected of a criminal offense, it has in addition been established by a guideline that the public prosecutor can only order a preliminary investigation after consulting the Board of Procurators General.³⁵⁷

Articles 141, 142 CCP and Article 2 Police Act 1993, as well as similar provisions for special law enforcement officers, have been accepted in the case law as sufficient bases for (at least) all investigative powers that do not interfere with privacy rights. These provisions do not provide investigative officers with complete discretion, considering that the use of investigative powers derived from the general police task is restricted by allowing such use only for the purpose of fulfilling that task: investigating criminal offenses.³⁵⁸ In the guideline it is stated that investigative powers on the basis of Articles 141-142 CCP and Article 2 Police Act 1993 can be used by investigative officers when necessary for the purpose of their law enforcement task if there are 'indications of criminal activities.'³⁵⁹ Furthermore,

³⁵⁵ See in this regard HR 19 December 1995, *NJ* 1996, 249, ann. Sch., annotation para 29. Before 1999 the Supreme Court often set standards for using specific investigative authorities for which an explicit basis in law was not yet established. For example: the establishment of the so-called *Tallon* criterion for the use of investigative infiltration. The *Tallon* criterion prohibits undercover agents from acting in such a way that the person being investigated commits criminal offenses other than those which were already the object of his criminal intent. HR 4 December 1979, *NJ* 1980, 356. A similar criterion has also been upheld by the ECtHR: ECHR 9 June 1998, case 44/1997/828/1034 (*Teixeira de Castro v. Portugal*), para 32.

³⁵⁶ *Kamerstukken II* 1997/97, 25 403, no. 3, 49-51.

³⁵⁷ See 'Aanwijzing opsporingsbevoegdheden', *Stcrt* 2011, no. 3240, 25 and *Kamerstukken II* 1996/97, 25 403, no. 3, 50 (expressing the intention to establish such a guideline).

³⁵⁸ Knigge and Kwakman 20010, 311-314.

³⁵⁹ Handboek voor de opsporingspraktijk 2000-2007, aanv. 5 July 2004 AI 1.1-6.

and very important also in the light of the requirement of being ‘necessary in a democratic society’ under Article 8(2) ECHR, the use of all investigative powers is bound by the principles of the due administration of justice, such as proportionality and subsidiarity. These principles and limiting the use of investigative powers to investigating criminal offenses (purpose limitation) are decisive for the legitimacy of the use of investigative powers that lack a specific regulation in the law (see in more detail [Sects. 2.1.3.4.1](#) and [2.1.3.4.2](#)).³⁶⁰ The right balance between using provisions which generally set tasks as the basis for investigative powers and requiring a specific regulation must be found. Investigative powers that (seriously) interfere with privacy rights must in any event be given a specific regulation in the law by means of an Act of Parliament, as the protection of the fundamental right to respect for private life and the interests served by the principle of legality explicitly require protection to be provided against arbitrary interferences with the right to private life by investigative actions by the government.

In closing, it must also be noted that the Act on the Intelligence and Security Services of 2002 (WIV 2002) provides a specific legal basis for the special investigative powers of the AIVD that seriously interfere with the protected right to respect for private life as laid down in Article 8 ECHR. With this Act, the legislature aimed to provide for a regulation that meets the requirements of Articles 8 and 13 ECHR, by explicitly regulating the specific powers of the intelligence services and the circumstances under which they can be used, as well as providing for an internal controlling body which is responsible for examining the proportionality and subsidiarity of the powers used in a specific case.³⁶¹

2.3.2.2 The Separation of Criminal Investigation from Other Forms of Investigation

The demarcation of the criminal investigation phase serves an important protective function, considering that it is generally understood to be the starting point of criminal procedural law under Article 1 CCP. Consequently, the regulations of the CCP apply, providing both for the conditions under which criminal investigative powers may be used and for the legal protection of those subjected to the government’s powers in the area of criminal procedural law.³⁶² Nevertheless, as will be seen in this section, the criminal investigation cannot always be clearly separated from other investigative spheres on the basis of the definition provided in Article 132a CCP. Administrative supervision may overlap with criminal investigation and the status of the preliminary investigation as ‘preceding’ the criminal investigation is not very clear. At the same time, the separation of the criminal investigation from other investigative spheres serves an important restrictive

³⁶⁰ See e.g. HR 11 October 2005, *NJ* 2006, 625, para 3.5.2.

³⁶¹ *Kamerstukken II* 1997/98, 25 877, no. 3, 2-3.

³⁶² Compare: Borgers 2011, 457.

function, considering that all activities covered by the definition of criminal investigation are also subjected to the protective regulations of the CPP. In that respect, in particular the separation from administrative supervision and from the intelligence community serves an important protective function. In order to address the separation of the criminal investigation from other forms of investigation, this section will firstly analyze the reasons for adopting the definition as provided in Article 132a CCP (Sect. 2.3.2.2.1). Subsequently, the separation from administrative supervisory authority (Sect. 2.3.2.2.2) and from the intelligence investigation (Sect. 2.3.2.2.3) will be dealt with. Lastly, attention will be given to the relation between the preliminary investigation and the criminal investigation (Sect. 2.3.2.2.4).

2.3.2.2.1 The Definition of a Criminal Investigation

The scope of the criminal investigation phase has gradually developed. Until the adoption of a definition (in Article 132a CCP) in 1999 by the Act on SIT, the scope of the criminal investigation was not defined in statutory law. Before 1999, a limited interpretation of the scope of the criminal investigation was generally favored. The criminal investigation was limited, according to this interpretation, to investigative activities on the basis of a reasonable suspicion, whilst proactive investigative activities were tolerated by considering these activities as being part of the administrative supervisory task of police officers on the basis of Article 2 Police Act 1993. However, this situation was unsatisfactory as the nature of proactive investigative activities required more precise regulation and protective guarantees for the subjects of the investigation.

For the first time, by the Act on SIT of 1999 a legal definition of the criminal investigation was adopted in Article 132a CCP. Article 132a CCP defined the criminal investigation on the basis of the responsible authority, the purpose of the investigation and the specific threshold for initiating a criminal investigation. Firstly, also according to the definition under Article 132a, the public prosecutor is the responsible authority for the criminal investigation. The supervisory authority of the public prosecutor shall be seen in relation to Article 148 CCP, giving the public prosecutor the authority to give orders to law enforcement officers. In the second place, the purpose of the criminal investigation must be the making of a prosecutorial decision, which excludes the use of powers in the criminal investigation for the sole purpose of gathering information (and thus general search or fishing expeditions). Using criminal investigative powers for purposes other than evidence gathering will constitute a violation of the prohibition of *détournement de pouvoir*.³⁶³ This limitation to the purpose of gathering information which is relevant for truth-finding regarding criminal offenses imposes an important restriction on the power to conduct criminal investigative activities, which has been a

³⁶³ See also Sect. 2.1.3.4.2.

principal reason for adopting a definition that includes this specific limitation.³⁶⁴ Thirdly, the definition limited the criminal investigation to activities conducted upon the establishment of a reasonable suspicion of a crime or a reasonable suspicion that crimes are being planned or committed in an organized context. These specific thresholds in the definition of criminal investigation have been adopted in order to limit the criminal investigative phase specifically to the clarification of a reasonable suspicion of a crime or a reasonable suspicion of involvement in the planning or committing of crimes in an organized context and in order to demarcate the criminal investigative phase from other investigative forms.³⁶⁵

Initiated by researchers of the Criminal Procedure Research Project of 2001, a broader definition of the criminal investigation is now favored, by which the specific reason for initiating the investigation is no longer included as a defining element. According to the researchers of 2001 Criminal Procedure Project, the purpose of the criminal investigation shall be the central defining factor, instead of the threshold of a reasonable suspicion.³⁶⁶ The Act of 20 November 2006 to broaden the possibilities to investigate and prosecute terrorist crimes has, in accordance with this approach, amended Article 132a CCP in order to broaden the definition of the criminal investigation by eliminating the threshold of a reasonable suspicion from the definition.³⁶⁷ The new definition provided in Article 132a defines a criminal investigation on the basis of supervision by the public prosecutor and the purpose of the investigative activities in relation to criminal offenses shall be to ‘make prosecutorial decisions.’ This implies a limitation on investigative activities for the purpose of gathering information which is relevant for making criminal procedural decisions regarding criminal offenses, such as the decision to charge or a decision to use coercive measures such as the power of arrest.³⁶⁸ Now, all investigative activities in relation to criminal offenses for the purpose of making prosecutorial decisions are part of the criminal investigation, whether conducted on the basis of Article 2 Police Act 1993, on the basis of a specific legal basis provided in the CCP (in particular the use of SIT), or on the basis of a provision for investigative powers in special criminal law. This means that any order given by the public prosecutor under Article 148 CCP falls within the scope of the criminal investigation (instead of only those related to SIT) and, with that, establishes the supervisory role of the public prosecutor for all criminal investigative activities.³⁶⁹ Moreover, all investigative activities that contribute to the purpose of gathering evidence for making prosecutorial decisions are subject to the protective provisions of the CCP rather than being regulated by administrative

³⁶⁴ *Kamerstukken II* 1997/98, 25 403, no. 7, 17 and *Handelingen II* 1998/99, no. 24, 1549.

³⁶⁵ *Kamerstukken II* 1997/98, 25 403, no. 7, 18.

³⁶⁶ Knigge and Kwakman 2001, 300-347.

³⁶⁷ *Stb.* 2006, 580.

³⁶⁸ *Kamerstukken II* 2005-2006, 30 164, no. 3, 17 and Borgers 2009, 40 and 46. See also [Sect. 2.1.3.4.2.](#)

³⁶⁹ See also: *Kamerstukken II* 2005-2006, 30 164, no. 7, 25.

law. For example, the duty to compile records under Article 152 CCP applies to all criminal investigative activities and the remedies provided in Article 359a CCP apply when investigative rules have been violated.³⁷⁰ For these reasons, the broadening of the definition of criminal investigation could be understood as being favorable to legal protection. Nevertheless, by adopting this definition the central role of the threshold of a reasonable suspicion has been abandoned, which has traditionally served as an important protective restraint against the government acting within the field of criminal procedural law, which opens the door to also using other thresholds for using investigative methods in the criminal investigation and, consequently, expanding the proactive capabilities of the criminal investigation. The protective role of the threshold of a reasonable suspicion will be further discussed in [Sect. 2.3.2.2](#).

The defining elements of the current definition of the criminal investigation are, according to the language of Article 132a CCP, both the purpose of the investigation and the supervision of the public prosecutor. Although the government referred to the proposals of the researchers of the 2001 Criminal Procedure Project when explaining the choice for adopting this definition, the inclusion of supervision by the public prosecutor in the definition was *not* in line with these proposals.³⁷¹ Also Borgers argues that it is only the purpose of the investigation that concerns a defining element, whereas supervision by the public prosecutor (as well as other criminal procedural guarantees such as Article 152 CCP and Article 359a CCP) consequently applies as a regulatory element to all activities that have been defined as a ‘criminal investigation.’³⁷² To determine what investigative activities are criminal investigative activities (and thus conducted for the purpose of ‘making prosecutorial decisions’) two approaches can be taken. Firstly, when the information produced by the investigative activities is possibly relevant to criminal law enforcement, these activities shall be defined as a criminal investigation. Secondly, only those activities conducted by investigative officers who also have criminal investigative authority (under Articles 141-142 CCP) are criminal investigative activities. Borgers chooses the latter approach, because the first is difficult to fit into the system of criminal procedural law (as will be explained in more detail in the next section).³⁷³ However, the disadvantage of this latter

³⁷⁰ Sikkema 2008, para 4.1. The Supreme Court seems to retain the older interpretation of the criminal investigation when addressing the applicability of Article 152 CCP and distinguishes, for that purpose, a criminal investigation under Article 132a CCP and an investigation for the purpose of gathering information in relation to criminal offenses ‘preceding’ the criminal investigation (although with the same outcome; Article 152 CCP also applies to the investigative activities ‘preceding’ the criminal investigation when these activities are conducted for the purpose of collecting information for criminal prosecution). See HR 5 October 2010, *LJN* BL5629. Borgers 2011, 462.

³⁷¹ *Kamerstukken II* 2005/06, 30 164, no. 7, 26.

³⁷² Borgers 2009, 53.

³⁷³ *Ibid.*, 57-59. This approach also seems to be the correct one according to the Supreme Court (upholding the reasoning of the Court of Appeal). HR 7 July 2009, *NJ* 2009 528, para 6.2.3 and 8.4 and Gerechtshof ‘s-Gravenhage 1 March 2007, *LJN* AZ9644, para 5.1.1.

approach is that criminal procedural safeguards, such as Article 359a CCP, will not apply to investigative activities that have been conducted, in violation of the principle of *détournement de pouvoir*, for criminal investigative purposes.

2.3.2.2.2 Separation from Administrative Supervision

The definition of criminal investigation as provided in Article 132a CCP seems to clearly separate criminal investigative activities from administrative supervisory activities. As has already been explained in the previous section and in [Sect. 2.2.2.1](#), criminal investigative activities were previously separated from other investigative activities with the presence of a reasonable suspicion. The disadvantage of such a 'limited' approach towards the criminal investigation was that proactive investigative activities were conducted outside of the criminal investigation, as part of the controlling task of the police and were thus not regulated by the CCP but by administrative law. And also after the adoption of the first definition of criminal investigation by the Act on SIT of 1999 (which included the threshold for the (partly) proactive investigation of organized crime) other proactive investigative activities based on Article 2 Police Act 1993 (instead of the provisions of Title V) aimed at the discovery of criminal activities for the purpose of generating evidence for criminal prosecution would fall outside the scope of criminal investigation and would be regulated by administrative law. On the basis of this more limited definition of a criminal investigation, administrative supervisory authority would cover the investigative activities preceding the phase of criminal investigation.³⁷⁴

The definition of criminal investigation adopted by the Act of 2006 now covers all police investigative activities that contribute to their law enforcement task. In that regard, the current definition of the criminal investigation seems to provide for a clearer demarcation of the criminal investigative phase. Currently, the purpose of the investigative activities concerns the dividing factor between criminal investigation and administrative supervision: the criminal investigation is conducted for the purpose of collecting information for making prosecutorial decisions, while administrative supervision is conducted for the purpose of controlling the observance of the (special criminal) law. Less clear is the element of the definition of Article 132a CCP providing that the criminal investigation occurs under the

³⁷⁴ Nevertheless, the exact scope of the criminal investigation has been, especially before the entry into force of the Act of 2006, rather ambiguous. On the one hand, the scope of Article 132a CCP was explained as separating criminal investigation from administrative supervision on the basis of the threshold of a reasonable suspicion. On the other hand, Article 148 CCP has been interpreted as referring to a broader definition of criminal investigation, namely also covering the investigative powers attributed in special criminal law, which can be applied 'in the interest of criminal investigation' and, hence, in the absence of a reasonable suspicion. Borgers 2011, 460. Because especially this ambiguity has been overcome by the definition adopted in 2006, the previous lack of clarity as to the scope of the criminal investigation will further be left out of consideration.

supervision of the public prosecutor. As described in [Sect. 2.2.2.2.2](#), there are situations where officers other than those enumerated in Articles 141 and 142 CCP have been attributed the power to employ administrative supervisory powers in special criminal Acts, whereas the use of these administrative supervisory powers may also be conducted for the purpose of tracing criminal offenses (also referred to as repressive control). However, these officers do not act under the supervision of the public prosecutor (under Article 148(2) CCP). Hence, when considering the element of supervision by the public prosecutor as a second defining factor, these activities also fall outside the scope of the criminal investigation as provided in Article 132a CCP and concern administrative supervision.³⁷⁵ Nevertheless, as already addressed in [Sect. 2.2.2.2.2](#), the use of administrative supervisory powers may result in the discovery of information which provides a reason for initiating a criminal investigation; the administrative supervision will then switch to a criminal investigation. Furthermore, sometimes administrative supervision overlaps with criminal investigation, which is also referred to as the cumulation of spheres.³⁷⁶ This section will continue to address the situation where administrative supervision switches to a criminal investigation and the situation where both spheres overlap, in order to explain the protective function served by the separation between administrative supervision and criminal investigation.

In its judgment of 1935 the Supreme Court addressed the situation where administrative supervision switches to a criminal investigation. In this case the officer in question, who also had criminal investigative authority on the basis of Articles 141 and 142 CCP, used his administrative supervisory authority to check whether the kitchen of a catering establishment was observing the ‘Alcohol Act’ and encountered a gun during these supervisory activities. According to the Supreme Court, the officer was authorized to seize the gun, as a continuation of using investigative powers, initially for administrative supervision and, subsequently, for a criminal investigation, also when these investigative powers have a basis in a different Act.³⁷⁷ When evidence of criminal activities is ‘in plain view’ during the application of administrative supervisory powers and the investigative officer in question is also authorized to employ criminal investigative powers, the administrative supervision may thus switch to a criminal investigation. The switch from administrative supervision to a criminal investigation would be illegitimate when evidence of criminal offenses is not found to be in plain view except by the application of administrative supervisory powers for criminal investigative

³⁷⁵ One could also argue that these activities concern criminal investigation and, consequently, the officers shall act under the responsibility of the public prosecutor. In that view, the element of supervision by the public prosecutor in Article 132a CCP is a regulatory element instead of also being a defining element for criminal investigation. In this line: Luchtman 2007B, 669-672, see also footnote 204 of this [Chap. 3](#), and: Peçi and Sikkema 2008.

³⁷⁶ Luchtman 2007A, 133-142 and Borgers 2011, 455.

³⁷⁷ HR 2 December 1935, *NJ* 1936, 250, ann. WP.

purposes. This would constitute a violation of the principle of *détournement de pouvoir*.³⁷⁸

Furthermore, administrative supervisory officers who are not criminal investigative officers under Articles 141 and 142 CCP may not use criminal investigative powers, for which reason the administrative supervision cannot switch to a criminal investigation in such a case.³⁷⁹ Nevertheless, most investigative officers are authorized to apply both administrative supervisory powers and criminal investigative powers. In addition, concurrent purposes may be pursued when using administrative supervisory powers, as long as it follows that the controlling power has *also* been used for the purpose for which it has been attributed. Hence, police officers may in fact, with the help of administrative supervisory powers, also trace criminal offenses, for example, by using the controlling power to stop vehicles in order to check that the Road Traffic Act is being observed and concurrently—or maybe even primarily—also to discover evidence of a crime.³⁸⁰

The situation when administrative supervision switches to a criminal investigation should be distinguished from the situation where administrative supervisory powers are used when information regarding the commission of a criminal offense is already present. The ‘cumulation of spheres’ may take different forms, varying from the abuse of administrative supervisory powers for the purpose of gathering evidence for criminal prosecution to the parallel use of administrative supervisory powers and criminal investigative powers.³⁸¹ Whereas the first, as already indicated, constitutes a *détournement de pouvoir*, the latter is permitted provided that when administrative supervisory powers are used against suspects, the suspect is entitled to his procedural rights as a suspect. Hence, instead of being obliged to cooperate (under Article 5:20 General Administrative Law Act), the suspect who is being subjected to controlling power is entitled to use his fundamental right to remain silent under Article 29(2) CCP and Article 6 ECHR.³⁸²

2.3.2.2.3 Separation from Intelligence Investigation

The investigative activities on behalf of the intelligence agency (AIVD) are explicitly separated from the criminal investigation on the basis of their different investigative purpose. Similar to the separation from administrative supervisory authority, also the separation from the intelligence community is based on

³⁷⁸ Corstens 2008, 273.

³⁷⁹ According to Borgers those investigative activities conducted for the purpose of making prosecutorial decisions and conducted on behalf of investigative officers under Articles 141 and 142 CCP meet the definition of a criminal investigation under Article 132a CCP. Borgers 2009, 50. *Kamerstukken II* 2005/6, 30 164, no. 7, 57-59.

³⁸⁰ Borgers 2011, 478.

³⁸¹ See on this subject and in particular the use of administrative supervisory powers under the Tax Act (also) for the benefit of gathering evidence for criminal offenses (such as tax fraud): Luchtman 2007A.

³⁸² Borgers 2011, 481-492 and Van Sliedregt 2006, 18-19.

differing investigative purposes. However, this separation from the intelligence community is, for protective reasons, more restrictive considering that there are no possibilities for fluent switches from intelligence investigation to criminal investigation and that the cumulation of both investigative spheres is prohibited.

While the law enforcement services aim to investigate offenses for the purpose of making prosecutorial decisions, the intelligence services gather information in the interest of protecting national security. The separation that follows from these distinguished purposes has been considered as a very important and critical separation, because the control over the manner in which evidence is gathered is an essential aspect of realizing the fairness of criminal proceedings in order to be able to assess the reliability of the information gathering. Facilitating this control requires transparency, at least in the trial phase, concerning the investigative activities, which clashes with the secrecy of intelligence investigations as a prerequisite for protecting national security interests. Hence, intelligence and law enforcement investigative activities are separated and subjected to different regulation frameworks.

The framework regulating the criminal investigation is underpinned by the desire to realize both the sword and the shield objective of criminal procedural law, in anticipation of fair criminal proceedings for which (internal and, in principle, also external) transparency, to be achieved in the trial phase, is the most important prerequisite. By contrast, the framework regulating the intelligence investigation (WIV 2002) is aimed in the first place at the effective protection of national security, while building in safeguards realizing control and preventing abuse.³⁸³ In line with this rationale, the use of intelligence powers for the purpose of gathering evidence for a criminal prosecution is forbidden, in order to guarantee that criminal procedural safeguards are not circumvented. Furthermore, the separation between criminal investigation and intelligence investigation is the point of departure and the exchange of information between intelligence and law enforcement communities is a delicate matter.

The legislative basis for this separation can be found in the WIV 2002.³⁸⁴ According to Article 9 the “functionaries of the services have no powers to investigate offenses.” And, while investigative officers may be asked to perform activities ordered by the AIVD, they can never use their criminal investigative powers when performing these activities. In Article 14 of the WIV 2002 the processing of information for the AIVD has been strictly separated from the processing of information by the relevant functionaries for other purposes. By means of these provisions, the separation between the intelligence and law enforcement communities has been given a statutory basis.

³⁸³ See on this framework [Sect. 2.2.2.4.1](#).

³⁸⁴ With that, the Act also meets the concerns of the Van Traa Parliamentary Inquiry Commission regarding the possibility of an overlap between intelligence investigation and law enforcement investigations (and consequently an abuse of power) due to a lack of statutory separation between the two communities. Rapport van de Parlementaire Enquêtecommissie Opsporingsmethoden 1996, 358.

The separation can also be found in the statutory basis for using the investigative powers of both services. While the authority of the law enforcement services to tap private communications is founded on Article 126l-m CCP, the AIVD can tap conversations on the basis of Article 25 WIV 2002 and on the basis of the exemption for services pursuing activities under the WIV of 2002 adopted in Article 139c(2)(3) of the Criminal Code, in which Article the tapping of private communications has been prohibited.³⁸⁵

2.3.2.2.4 The Relation Between the Preliminary Investigation and the Criminal Investigation

The legal basis for the preliminary investigation can be found in Articles 126gg-126ii CCP. According to Article 126gg(1) CCP the purpose of the preliminary investigation is to prepare the criminal investigation. Strictly speaking, this purpose differs from the purpose of the criminal investigation under Article 132a CCP, for which reason the preliminary investigation could be understood as a separate investigative phase preceding the criminal investigation.

The separate regulation of the preliminary investigation was also part of the Act on SIT of 1999 in order to provide a specific legal basis for certain proactive investigative activities instead of continuing to base these activities on Article 2 Police Act 1993. Practice had demonstrated that there was a need for proactive investigative activities in complex cases regarding organized crime to decide whether and in what way a criminal investigation into organized crime shall be started. Especially in complex cases, the criminal investigation was—before 1999—often preceded by an orientating investigation in order to determine whether there were sufficient grounds to start a criminal investigation. In practice, the border between the investigative activities covered by the criminal investigation and those excluded from that phase (and thus labeled as administrative supervisory authority) was imperceptible.³⁸⁶ Considering the then applied limited definition of the criminal investigation, the activities in this orientating, preliminary phase were uncontrollable and unlimited, whereas Article 2 Police Act 1993 can in the light of Article 8 ECHR only legitimize simple information gathering, without the application of investigative powers and not the collection of personal details of groups of people not (yet) suspected of a criminal offense. The legislature considered it necessary to maintain the possibility to conduct such a preliminary investigation, but decided to regulate it in the CCP and to limit it to certain activities and to serious crimes. In fact, the adoption of this preliminary investigative phase in the CCP is a solution to the lack of a basis in law for activities in the proactive phase that might interfere with privacy rights.

³⁸⁵ Although Article 139c(2)(3) CCP also excludes tapping for a criminal investigation from this prohibition, the statutory basis for the powers are the provisions in Articles 126l to 126m CCP.

³⁸⁶ 't Hart 1983, 158.

The legislature decided to adopt the basis for the preliminary investigation as a separate investigative phase in the CCP, preceding the criminal investigation as defined in Article 132a CCP. Considering the definition of the criminal investigation adopted in the Act on SIT of 1999, including the threshold of a reasonable suspicion, this preliminary investigation would indeed fall outside the scope of that definition. Accordingly, the purpose of the preliminary investigation was formulated so as to prepare the criminal investigation. This purpose of the *preparation* of the criminal investigation means that the preliminary investigation is aimed at making a decision as to whether or not it is necessary to initiate a full investigation. It may produce the initial information for a criminal investigation through the possibility of gathering additional information and comparing and combining information, which may increase the level of the information that is available to a level which is sufficient for initiating a full criminal investigation. Furthermore, the preliminary investigation is limited to activities by law enforcement officers and can only be initiated upon the order of the public prosecutor. Authorization by an examining magistrate is required to obtain access to a private databank. Lastly, the preliminary investigation may only be initiated when indications are present, following from facts and circumstances, that within groups of persons serious (Article 67 CCP) crimes are being planned or committed that, considering their nature or their relation to other crimes planned or committed within those groups of people, (will) result in a serious violation of the legal order. The meaning of the 'indications' threshold in relation to the threshold of a reasonable suspicion will be dealt with in [Sect. 2.3.2.3.2.3](#).

As indicated, the legislature intended to separate the preliminary investigation from the criminal investigation by formulating the definition as described and distinguishing the purpose of 'the preparation of the criminal investigation' from the criminal investigation's purpose of 'making prosecutorial decisions.'³⁸⁷ Nevertheless, when taking into account the just described defining elements for the preliminary investigation according to Article 126gg CCP and comparing those with the current definition of the criminal investigation, the separation, and the reasons for such a separation, from the criminal investigation seem rather artificial. The purpose of preparing the criminal investigation will eventually contribute to the purpose of the criminal investigation, namely making prosecutorial decisions. The information gathered during the preliminary investigation will be used exactly for that purpose. In addition, Article 126gg could rather be seen as the specific legal basis for conducting these proactive criminal investigative activities under the provided conditions. Considering the preliminary criminal investigation to be part of the criminal investigation would also not affect the established public prosecutor's supervision of the investigative activities conducted by law enforcement officers and would avoid doubts as to the applicability of the duty to compile records and other procedural safeguards, such as Article 359a CCP.³⁸⁸

³⁸⁷ *Kamerstukken II* 2004/04, 30 164, no. 3, 17.

³⁸⁸ Compare Pegi and Sikkema 2008, 361.

Strictly speaking, the duty to compile records currently only applies to the preliminary investigative activities of Articles 126hh and 126ii CCP in the preparation of the full criminal investigation of terrorist crimes and to those preliminary investigative activities that have produced initial information for a criminal investigation as a consequence of Article 126aa CCP. Considering that beforehand it will be uncertain whether it will be required to provide an account of preliminary investigative activities in the context of a criminal trial—because this information has been used as the initial information or has otherwise been introduced in the criminal proceedings—it is difficult to understand why the duty to compile records should not generally also apply to the preliminary investigative activities of Article 126gg CCP.³⁸⁹ Regardless of these arguments, the legislature has upheld the distinction between the preliminary investigation and the criminal investigation on the basis of the differing investigative purposes when discussing the Act of 2006 to amend Article 132a CCP.³⁹⁰

Because of the adopted definition of criminal investigation in this research and the above demonstrated superfluous nature of a distinction under Dutch criminal procedural law from a normative point of view, the term criminal investigation relating to the Dutch situation shall be understood to cover also the preliminary investigation.³⁹¹ Therefore, the preliminary investigative phase will further be understood as a proactive investigative power in the criminal investigation on the basis of a threshold (indications) that is different from the threshold which is applicable to SIT.

2.3.2.3 The Suspicion Requirement

The status of a ‘suspect’ and the requirement of a ‘reasonable suspicion’ under Article 27 CCP have traditionally obtained, in the Dutch CCP, a central position as the requirement separating criminal investigative activities from other investigative activities and to impose an important restraint on the government’s power to investigate for the purpose of gathering evidence for criminal prosecution.

The suspicion of a crime has traditionally functioned as a mandatory requirement for initiating a criminal investigation and in general as the basic assumption legitimizing activities of the government in the field of criminal procedural law.³⁹² This strict demarcation of the criminal investigative phase on the basis of a reasonable suspicion of a crime can currently no longer be upheld, considering the possibilities for proactive criminal investigation on the basis of the threshold of a reasonable suspicion that crimes are being planned or committed in an organized context and considering the possibility of conducting a preliminary criminal

³⁸⁹ Feuth 2002, 110–112 and Borgers 2009, 50. *Kamerstukken II* 2005/6, 30 164, no. 7, 53.

³⁹⁰ *Kamerstukken II* 2004/05, 30 164, no. 3, 17.

³⁹¹ Compare HR 8 September 2009, *NJ* 2009, 427, Opinion of Advocate General Jörg para 9. The same position has also been taken by Corstens 2008, 260 and Borgers 2009, 50. *Kamerstukken II* 2005/6, 30 164, no. 7, 53.

³⁹² Sikkema 2008, para 3.1 and Van Sliedregt 2006, 5.

investigation in preparation for a full criminal investigation. In addition, as already explained in the previous section, the suspicion is no longer part of the definition of the criminal investigation: the criminal investigation covers all investigative activities conducted under the responsibility of the public prosecutor for the purpose of making prosecutorial decisions. Nevertheless, the threshold of a reasonable suspicion still fulfills a central role as the triggering mechanism for many criminal procedural powers and, in particular, for the use of special investigative techniques in the context of the criminal investigation.

This section will continue to focus on this shield function of a reasonable suspicion as a triggering mechanism for SIT in the criminal investigation. For this purpose, firstly the definition of a suspect as provided in Article 27(1) CCP will be analyzed (Sect. 2.3.2.3.1). Subsequently, the meaning and variety of different levels of suspicion in different areas of the criminal investigation—mainly, the classical investigation, the organized crime investigation and the preliminary investigation—will be analyzed (Sect. 2.3.2.3.2). Using SIT for the investigation of conventional crime (the classical investigation) can only commence with the establishment of a suspicion of a crime (Sect. 2.3.2.3.2.1). With regard to the use of SIT in criminal investigations of organized crime, a suspicion threshold with a different content applies. Here, the establishment of a reasonable suspicion that crimes (Article 67 CCP crimes) are being planned or committed in an organized context allows the use of investigative powers in the context of the criminal investigation (see Sect. 2.3.2.3.2.2). For initiating a preliminary investigation another threshold must be met: ‘indications’. This threshold of ‘indications’ can be considered as the lowest level of suspicion, which will be addressed, also in its relation to a reasonable suspicion, in Sect. 2.3.2.3.2.3. Furthermore, Sect. 2.3.2.3.2.4 will deal with the indications threshold as is applied to some investigative powers in special criminal law. Lastly, any other forms of suspicion will be dealt with as well as supplementary ‘triggering’ conditions, such as ‘serious concerns’, required for e.g. frisking, which is a stronger version of a suspicion, and the requirement of being ‘in the interest of the investigation’. The section will conclude by reflecting on the protective function of the suspicion threshold from the perspective of the right to respect for private life, the right to a fair trial and the presumption of innocence (Sect. 2.3.2.3.3).

2.3.2.3.1 The Definition of a Suspect: Article 27 CCP

A definition of the concept of a reasonable suspicion is not provided in the law. However, for the interpretation of the concept, there is a relation with the definition of a suspect as provided in Article 27(1) CCP.³⁹³ According to Article 27(1) CCP a person can, before a prosecution has been initiated, be considered to be a suspect when a reasonable suspicion that he or she is guilty of having committed a

³⁹³ The second section of Article 27 CCP provides for the definition of a suspect during the trial phase, which will be left out of consideration.

criminal offense can be derived from the facts or circumstances.³⁹⁴ The definition of a suspect as provided in Article 27(1) CCP has a legitimizing as well as a protective consequence. Legitimizing, because once someone is labeled as a suspect the government may use—sometimes in combination with other requirements—specific investigative and coercive methods that intrude on the suspect's rights or freedoms (e.g. arrest, pre-trial detention and SIT). The counter-side of this legitimizing consequence is also a restrictive consequence: the government is restricted to only using these specific investigative and coercive methods against suspects. In addition, once someone is a suspect, he or she is attributed some procedural rights, such as the right to remain silent and the right to be informed about the evidence against him or her (during the pre-trial phase only if the interest of the investigation is not obstructed by disclosure).³⁹⁵ For this reason, a reasonable suspicion is considered to be the equilibrium between, on the one hand, the interest of providing legal protection against arbitrariness in the government's use of its criminal investigative power and, on the other hand, the interest of criminal law enforcement.³⁹⁶ For the subject-matter of this book, in particular the meaning of a suspicion as the triggering moment for investigative action is relevant.

Considering the definition of a suspect provided in Article 27(1) CCP, the establishment of a reasonable suspicion requires that from an objective point of view one can reasonably be suspected of being guilty of having committed a criminal offense. This objective degree of reasonableness must be based upon facts and circumstances, which concerns objective and concrete information relating to a criminal offense which has been committed.³⁹⁷ What facts and circumstances are

³⁹⁴ Article 27(1) CCP. The original wording of Article 27(1) CCP is: “*Als verdachte wordt vóórdat de vervolging is aangevangen, aangemerkt degene te wiens aanzien uit feiten of omstandigheden een redelijk vermoeden van schuld aan eenig strafbaar feit voortvloeit.*” The latter part of ‘eenig strafbaar feit’ (any criminal offense) is translated as having committed a criminal offence, because the relation of this part of the sentence with ‘reasonable suspicion of guilt’ implies the fulfillment of the provision defining the criminal offence, and, hence, the commission of the criminal offense described in that provision. Compare: Sikkema 2008, para 7.1 and Van Sliedregt 2006, 8.

³⁹⁵ Article 30 CCP (as amended by the Act on strengthening the position of the examining magistrate, *Kamerstukken I* 2010-2011, 32 177, no. A). Article 31 CCP provides what particular records must be disclosed to the suspect during the pre-trial phase (such as records of his/her interrogation and records of investigative activities that could be attended by the suspect or his/her lawyer). Disclosure may be delayed if it would obstruct the interest of the investigation (Article 30(2) CCP). During the covert criminal investigation disclosure is, obviously, not yet warranted. Suspects in the criminal investigation will normally not be aware of their status as a suspect, until the (*ex post*) notification (Article 126bb(3) CCP) or the disclosure of the evidence gathered against him on the basis of Article 126aa(1) and (4) as soon as the interest of the investigation so allows (which will usually concur with the first interrogation of the suspect).

³⁹⁶ Compare: Knigge 2005, 353.

³⁹⁷ The element of ‘facts and circumstances’ has no further specific legal relevance. It only requires a degree of objectivity, rather than that only certain information can be defined as either a fact or a circumstance or that both a fact or a circumstance are, as a minimum, required. Compare: Sikkema 2008, para 9.

needed to amount to a suspicion that is reasonable is rather vague. The only point of departure provided by the legislature is that the suspicion shall be reasonable not only in the subjective opinion of the law enforcement officer, but for any reasonable person, which requires a degree of objectivity.³⁹⁸ Hence, the reasonable suspicion should be based on facts and circumstances that are also visible to others.³⁹⁹ In the case *Murray v. The United Kingdom* (1994), the ECtHR also provided a definition of reasonable suspicion as the requirement for an arrest, which includes a certain degree of objectivity: “acts or information which would satisfy an objective observer that the person concerned may have committed a criminal offence.”⁴⁰⁰ ‘Reasonableness’ attributes a certain margin of appreciation to the investigative officer, the public prosecutor or the examining magistrate assessing the presence of a reasonable suspicion on the basis of the facts and circumstances. Hence, judges exerting *ex post* control will examine whether the officer in question could reasonably reach the conclusion that a suspicion of a crime was present.⁴⁰¹

Thus, a reasonable suspicion must be supported by facts and circumstances that are open to objectification, such as the observation of criminal behavior, statements of witnesses or clues as to a criminal offense. Case law has provided for clarification with respect to the question of which specific facts and circumstances can establish a reasonable suspicion. An overview will be given.

A judgment of the Court of Appeal of Amsterdam from 1977 (*Hollende kleurling*), concerning the reasonable suspicion under Article 27, held that the fact that a colored person was seen running away from a café which was known to the police as a place where drugs trafficking took place was insufficient for the establishment of a reasonable suspicion that someone was guilty of having committed a criminal offense.⁴⁰² Because this decision has been one of the few where the courts have found that the information present was insufficient for the establishment of a reasonable suspicion as required, this decision is still referred to in order to provide guidance as to the nature of the facts and circumstances which are required to meet the threshold of a reasonable suspicion. In another case concerning only a slightly different situation, the facts and circumstances were considered to be sufficient for establishing a reasonable suspicion. In this case, the observation of a car, known to the police to be in the possession of a drugs trader and to be used by persons also known as drugs traders, that drove away from a place which was known as a place where drugs were traded, was sufficient information for establishing a reasonable suspicion.⁴⁰³

³⁹⁸ See *Kamerstukken II* 1913/14, 286, no. 3, 39.

³⁹⁹ Sikkema 2008, para 8.1.

⁴⁰⁰ Compare: ECHR 28 October 1994, App. no. 14310/88 (*Murray v. The United Kingdom*), para 51.

⁴⁰¹ Van Sliedregt 2006, 7.

⁴⁰² Gerechtshof Amsterdam 3 June 1977, *NJ* 1978, 601.

⁴⁰³ HR 8 February 2000, *NJ* 2000, 316.

On the basis of these decisions it seems that there should be some sort of factual information that points to the involvement of these specific persons in the suspected crime. In other words: factual information demonstrating a link between the suspected person and the suspected crime. Another example, where such a nexus was lacking and, hence, a reasonable suspicion was unjustly assumed as the basis for requesting a blood test in relation to a suspicion of drunken driving was at issue in a Supreme Court case in 2005. Here, considerably exceeding the speed limit was insufficient information for also establishing a reasonable suspicion of drunken driving.⁴⁰⁴ Nevertheless, the Supreme Court has accepted that investigative officers could establish a reasonable suspicion of an offense criminalized in the Drugs Act on the basis of the knowledge of the investigative officers that persons from the west of the Netherlands often transport drugs to the northern part of the Netherlands (Groningen), when observing a car occupied by persons who were from the western part of the Netherlands at a place known for trading in drugs.⁴⁰⁵ Here, facts and circumstances linking these persons to the suspected crime seems to be absent and, hence, one may doubt the insufficiency of the facts and circumstances for establishing a reasonable suspicion in the *Hollende kleurling* case in the light of this more recent case law.⁴⁰⁶

More in general, it follows from the case law that the intuition of police officers is insufficient for establishing a reasonable suspicion, while judgments of police officers based on experience may contribute to establishing a reasonable suspicion.⁴⁰⁷ Intuition concerns a mere subjective notion, while the experience of police officers concerns knowledge which is open to objectification. Also the knowledge of police officers that the person is a recidivist with regard to bicycle theft has been accepted as contributing to the establishment of a reasonable suspicion.⁴⁰⁸

Furthermore, it has been accepted that anonymous information can trigger a criminal investigation.⁴⁰⁹ Also the ECtHR has accepted anonymous sources as the basis for using criminal procedural powers in the pre-trial phase.⁴¹⁰ Anonymous information, for example provided through the 'Report Crime Anonymously

⁴⁰⁴ HR 6 September 2005, *NJ* 2006, 447.

⁴⁰⁵ HR 4 April 2000, *NJ* 2000, 735, 3.4 and 3.5.

⁴⁰⁶ Compare: Van Sliedregt 2006, 16.

⁴⁰⁷ As also follows from the described cases, the circumstance that the observed behavior occurs at a place 'known as a place where drugs trading takes place', or the knowledge that persons from the western part of the Netherlands transport drugs to the northern provinces, were relevant circumstances for establishing a reasonable suspicion. See, furthermore, HR 14 January 1975, *NJ* 1975, 207, para 4 and HR 20 March 1984, *NJ* 1984, 549, para 2 and Sikkema 2008, para 9.

⁴⁰⁸ HR 7 November 2006, *NJ* 2007, 108, para 3.2.2 and Opinion Advocate-General para 6.

⁴⁰⁹ E.g.: HR 18 November 1980, *NJ* 1981, 125, para 6, HR 13 June 2006, *NJ* 2006, 346, para 3.5, HR 22 January 2008, *LJN* BC1375 and HR 11 March 2008, *NJ* 2008, 328, para 3.5. See also: Brinkhof 2008, 1224-1228.

⁴¹⁰ ECHR 20 November 1989, *Kostovski v. The Netherlands*, App. no. 11454/85, para 44: "The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter."

Foundation' [*Stichting Meld Misdaad Anoniem*], can establish a reasonable suspicion without support from other sources if the information is sufficiently concrete and is subjected to an initial check by the police as to its veracity (not of the source but of the factual information provided).⁴¹¹ Taking into account the case law available where anonymous information is used as the basis for a reasonable suspicion, it seems that such a follow-up check by the police is required before the anonymous information can be used to establish a reasonable suspicion. Nevertheless, it has not been explicitly excluded that also without this verification through further research the anonymous information may still establish a reasonable suspicion.⁴¹² Furthermore, also official reports of the criminal intelligence unit (CIE, see [Sect. 2.2.1.1](#)) have been accepted as sufficient for establishing a reasonable suspicion.⁴¹³ The police receive these reports from the criminal intelligence unit as anonymous sources.⁴¹⁴ The veracity of the CIE information may, however, be presumed, because, different from anonymous tips received by the police, the information that the CIE communicates to the police has been subjected to procedural guarantees as to the gathering thereof and its transfer, the CIE has already checked the veracity of informants and the identity of the informants is known to the CIE.⁴¹⁵ In addition, a special CIE public prosecutor can randomly control the information collected at the CIE.⁴¹⁶

It has also been accepted that a suspicion can be based upon information solely originating from the intelligence service AIVD without any supporting information from a police investigation.⁴¹⁷ This has, however, not been accepted when the AIVD has received this information from anonymous sources and other supporting evidence cannot be found, also after a follow-up check by the police.⁴¹⁸ The

⁴¹¹ HR 13 June 2006, *NJ* 2006, 346, para 3.4 and 3.5, HR 22 January 2008, *LJN* BC1375 and HR 11 March 2008, *NJ* 2008, 328, Opinion of Advocate General Machiels para 3.3 and HR 3.5.

⁴¹² See also: Annotation Borgers, HR 11 March 2008, *NJ* 2008, 329, ann. Borgers, para 4 and Sikkema, 2008, para 11.1.

⁴¹³ HR 14 September 1992, *NJ* 1993, 83, para 5.3, HR 25 September 2001, *NJ* 2002, 97, para 3.5, HR 22 December 2009, *LJN* BJ8622, para 2.4 See also HR 12 May 2009, *LJN* BH: 5249, para 9, referring to a guideline of the PPS, where it has been indicated that CIE information can be used, when it is sufficiently concrete, to establish a reasonable suspicion. However, the reports cannot be used as evidence because the information concerns intelligence, which still needs to be checked (e.g. in the context of a criminal investigation aimed at clarifying a reasonable suspicion). Nevertheless, the Head of the regional CIE unit can be heard as a witness regarding information obtained by the CIE from secret informants and his testimony may then be used as evidence. See e.g. HR 5 October 1982, *NJ* 1983, 297 and HR 2 March 1982, *NJ* 1982, 460. See on the use of CIE information as starting information also in detail Brinkhoff 2009, 117-122.

⁴¹⁴ See e.g. HR 14 September 1992, *NJ* 1993, 83, para 5.3.

⁴¹⁵ Sikkema 2008, para 11.2.

⁴¹⁶ The control exerted by the CIE public prosecutor may *de facto* be rather limited, considering that control over specific CIE reports used as starting information for criminal investigations is not exerted. Brinkhoff, 2009, 114-116.

⁴¹⁷ HR 5 September 2006, *NJ* 2007, 336, para 6.2 and para 6.3.2.

⁴¹⁸ HR 11 March 2008, *NJ* 2008, 329, para 3.4.

Supreme Court has ruled that it is acceptable to use AIVD information for establishing a suspicion when, firstly, it does not appear that the information is used with the intention to set aside criminal procedural powers in order to circumvent criminal procedural guarantees and, secondly, when the activities of the intelligence agency have not violated the fundamental rights of the suspect in a way that is contrary to the right to a fair trial.⁴¹⁹ As explained in [Sect. 2.2.2.4.2](#), the AIVD can send an official report to the PPS, which can thus subsequently trigger a criminal investigation. In [Chap. 3](#), the manner in which the courts have dealt with intelligence information, both as triggering information for criminal investigation and in criminal proceedings in general, will be dealt with in more detail, as it concerns one of the implications of an increased focus on prevention during investigative activities and, hence, an aspect of anticipative criminal investigation.⁴²⁰

It can be concluded that the interpretation given to a ‘reasonable suspicion of a crime’ under Article 27(1) CCP is rather broad. ‘Soft’ information, such as anonymous tips, CIE reports or AIVD information has been considered as sufficient facts and circumstances open to objectification to establish a reasonable suspicion that someone is guilty of having committed a crime.

2.3.2.3.2 Different Degrees of Suspicion

The previous section has provided an analysis of the threshold of the definition of a suspect under Article 27(1) CCP and the facts and circumstances that have been accepted in the case law as being sufficient for establishing a reasonable suspicion. This specific analysis of the definition of a suspect under Article 27(1) CCP has been made because the concept of a suspect has traditionally been the starting point of activities by the government in the field of criminal procedural law and still fulfills a central role as the threshold for using investigative methods that interfere with privacy. Nevertheless, the definition of a suspect and the related threshold of a ‘suspicion of a crime’, triggering the use of SIT, is currently no longer exclusively the triggering mechanism for the use of criminal procedural powers that interfere more than only to a limited degree with the right to privacy. Within the criminal investigation different domains can be distinguished, in which a different level of suspicion is used to trigger the use of SIT. Most important in this regard is the distinction between the investigative domain of classical investigation (Title IVa) and the investigative domain of organized crime (Title V). For the use of SIT under Title IVa a reasonable suspicion of a crime is required, which is related to the definition of the suspect provided in Article 27(1) CCP. Under Title V a lower version of suspicion, different from the interpretation of reasonable suspicion on the basis of Article 27(1) CCP, is the triggering mechanism for using

⁴¹⁹ HR 5 September 2006, *NJ* 2007, 336, para 4.7.2.

⁴²⁰ See [Chap. 3](#), [Sects. 3.3.1](#) and [3.3.3](#).

SIT. In the preliminary investigation (Title Ve) a threshold that requires information amounting to ‘indications’ instead of a reasonable suspicion is applied. An analysis of the relationship between these levels of suspicion and the threshold of a reasonable suspicion under Article 27(1) CCP will be made. In addition, within the different domains, sometimes either supplementary conditions or less demanding conditions are required for specific techniques, including stronger and milder versions of suspicion, such as ‘serious concerns’ for frisking and indications of being ‘in the interest of the investigation’ in some special criminal statutes. Also these and any other applied degrees of suspicion will be dealt with as to their relation to the ‘reasonable suspicion’ of Article 27(1) CCP.

2.3.2.3.2.1 *Title IVA: The Classical Investigation*

Under Title IV special investigative techniques can be used when a reasonable suspicion that a crime has been committed can be established (sometimes supplemented by other conditions). The threshold of suspicion in classical investigations is satisfied when three requirements are met: (i) there is a reasonable suspicion that a criminal offense has been committed; (ii) there is a reasonable suspicion of the guilt of the person involved—whoever that may be—with respect to the committed offense and (iii) the reasonable suspicion should be based on the facts and circumstances.⁴²¹ The consequence of the connection between the reasonable suspicion and the crime, rather than between the reasonable suspicion and the suspect (as in the definition of Article 27(1) CCP as well as in the provisions for some investigative powers that can only be applied against the suspect, such as arrest), is that the use of SIT in the classical criminal investigation is not limited to the person of the suspect only but can concern several persons who can be related to that reasonable suspicion of a crime and the use of SIT against these persons is ‘in the interest of the investigation’.⁴²² This view is supported by the explicit determination in the regulations of the specific special investigative techniques that they can be applied against ‘a person’ (and not against ‘the suspect’). In addition, it is only prescribed that a description of the suspect is provided, which does not necessarily include his or her personal details. After all, the use of SIT will usually be aimed at finding the suspect.

The previous section has already dealt with the facts and circumstances that are sufficient for establishing a reasonable suspicion. For initiating a classical investigation under Title IVA it is primarily relevant to note that rather soft information can establish a reasonable suspicion. An anonymous tip, CIE reports or an official report by the AIVD can trigger the use of SIT under Title IVA.

⁴²¹ Compare Corstens 2008, 88.

⁴²² See also Supplement to ‘Handboek voor de opsporingspraktijk’ (2004), *Stcrt* 10 December 2007, no. 239/p. 11, 2.

2.3.2.3.2.2 *Title V: The Organized Crime Investigation*

The complexity of the organizational context and the seriousness of the crimes committed have justified the adoption of a different threshold of application for organized crime investigations and, consequently, a separate investigative domain for organized crime under Title V. Although the use of the wording ‘reasonable suspicion’ may suggest otherwise, it should not be interpreted as referring to the definition of a suspect provided in Article 27(1) CCP.⁴²³ The difference between the threshold applicable under Title IVa and Title V concerns the object of the reasonable suspicion. Under Title V the reasonable suspicion shall not concern a committed crime, but the planning or commission of serious (Article 67 CCP) crimes in an organized context, which considering their nature or relation with other crimes committed in that organized context result in a serious infringement of the legal order. Hence, also under Title V the required reasonable suspicion shall be open to objectification and the level of information required to establish a ‘reasonable suspicion’ does not differ,⁴²⁴ but the object of the suspicion is broader: not a specific committed crime, but a criminal organization committing or planning to commit multiple but not necessarily specifically identified crimes. The object of the reasonable suspicion of Title V includes different elements: an organizational context; serious (Article 67 CCP) crimes that are being planned or committed; and a serious infringement of the legal order. Whilst the formulation of the reasonable suspicion requirement for organized crime investigation is considerably broader than the ‘ordinary’ suspicion threshold, these elements as well as the requirement of facts and circumstances establishing a ‘reasonable suspicion’ do have a restrictive function. The different elements of the threshold for applying SIT under Title V will be analyzed separately and, subsequently, the relation between the investigative domain of Title V and that of Title IVa will be addressed.

The Parliamentary Inquiry Commission has for the first time tried to define the concept of organized crime. According to their definition, organized crime exists when groups of people: (a) primarily aim at gaining unlawful profit; (b) systematically commit crimes with serious consequences for society; and (c) have the ability to mask these crimes in a relatively effective manner, particularly by being prepared to use physical violence or by eliminating people through corruption.⁴²⁵ In practice, this definition of organized crime as formulated by the Parliamentary Inquiry Commission is not used. The Supreme Court considered the existence of an organized context to be sufficiently proven by a concurrence of different factors, such as the commission of several criminal offenses during a certain period, cooperation with and the involvement of other people, criminal activities ordered by other people or close cooperation between several people in, for example, the

⁴²³ *Kamerstukken II* 1996/1997, 25 403, no. 3, 23.

⁴²⁴ See HR 23 October 2007, *LJN* BB3067 (Opinion of the Advocate General).

⁴²⁵ *Kamerstukken II* 1995/96, 24 072, nos. 10-11, 25 and *Kamerstukken II* 1996/97, 25 403, no. 3, 4. HR 7 November 2000, *LJN* AA8207 and HR 7 October 2003, *NJ* 2004, 118, para 34.

drugs trade.⁴²⁶ The ‘guide for criminal investigative practice’ provides that the specific characteristics of an organized context are cooperation between two or more persons, one or more collective objective(s) and a certain level of continuity.⁴²⁷ The seriousness of the crimes involved and the expectation that several people are involved are in practice factors which are sufficient to assume an organized context for the purpose of deciding on using SIT.⁴²⁸ This means that the element of an ‘organizational context’ in the reasonable suspicion threshold of the investigative domain of Title V is considerably less strict than that which is required for demonstrating a reasonable suspicion of the crime of membership of a criminal organization (Article 140 Penal Code). For the latter, facts and circumstances are required concerning some evidence of participation in that criminal organization, concerning the objective of committing crimes and concerning a more structured and enduring form of cooperation.⁴²⁹ Demonstrating a reasonable suspicion of the organizational context shall therefore not be seen as a very difficult hurdle.⁴³⁰

The second element of serious crimes (under Article 67 CCP) that are being planned or committed enables the proactive application of SIT under Title V. This element requires, firstly, a multitude of crimes and, secondly, crimes for which pre-trial detention can be imposed. The possibility of using SIT under Title V for only the investigation of serious crimes implies that the legislature has only considered the proactive use of SIT which are proportionate to the investigation of serious crimes. A similar limitation is imposed on the use of SIT under Title IVa, when the SIT have a more intrusive character, such as infiltration under Article 126h CCP or wire-tapping under Article 126l CCP. When focusing on organized crime, it will also be a rather simple matter to demonstrate a relation with serious and multiple crimes. Furthermore, the element refers, instead of to committed crimes, to crimes that are *being* committed and to the planning of crimes. The standard differs from the Article 27(1) CCP standard employed under Title IVa, because the reasonable suspicion may concern unspecified crimes.⁴³¹ Nevertheless, the organized crime investigation under Title V is not *per se* proactive. The investigation will usually be carried out in relation to crimes which have already been committed. Also, requiring a reasonable suspicion that crimes are being committed implies that there must usually be some commencement of committing the crimes. Moreover, the planning of crimes in an organized context will almost always involve a reasonable suspicion that people are participating in a criminal

⁴²⁶ HR 7 November 2000, *LJN* AA8207 and HR 7 October 2003, *NJ* 2004, 118, para 34.

⁴²⁷ Supplement to ‘Handboek voor de opsporingspraktijk’ (2004), *Stcrt* 10 December 2007, no. 239/p. 11, 2.

⁴²⁸ Beijer et al. 2004, 114.

⁴²⁹ ‘Aanwijzing opsporingsbevoegdheden’ 24 February 2011, *Stcrt* 2011, 3240, 2 and Krommendijk et al. 2009, 115.

⁴³⁰ Krommendijk et al. 2009, 115.

⁴³¹ Corstens 2005, 259-260.

organization and sometimes a reasonable suspicion as to the criminal preparation.⁴³² However, the investigation is not limited to clarifying a reasonable suspicion of someone's involvement in a criminal organization and will extend to the planning and commission of crimes in that criminal organization.⁴³³ Moreover, the concept of 'planning' is much broader than criminalized acts that concern the planning of (full) crimes, for which reason the scope of the Title V investigation may be much broader than Title IVa investigations into acts of preparation, conspiracy or membership of a criminal organization. The 'planning' in the threshold which is applicable under Title V does not need to concern a criminal act itself and may concern any activity preceding a criminal offense, such as consultation or the making of plans.⁴³⁴

Lastly, the element of 'resulting in a serious infringement of the legal order' applies as an additional requirement for the use of SIT under Title V. The requirement of 'resulting in a serious infringement of the legal order' can also be found in the provisions for some of the SIT under Title IVa. Just as under Title V, this additional requirement has been adopted to subject the use of the more intrusive SIT to an additional test as to the proportionality of the use of SIT: the use of a specific SIT is only proportionate for the investigation of crimes that result in a serious infringement of the legal order. The facts and circumstances of a specific case will demonstrate whether the element of a 'serious infringement of the legal order' has been met. The nature of the crime itself may seriously infringe the legal order, such as murder. But also crimes with a violent character, the multitude of crimes committed, the consequences of the crimes for society and the combination of less serious offenses with other offenses are relevant circumstances in order to determine a serious infringement of the legal order.⁴³⁵ The Supreme Court has considered the requirement of a 'serious infringement of the legal order' in the context of a SIT under Title IVa to have been met, for example, when the suspected theft or misappropriation of a cell phone from a fire engine within a closed fire station had been committed by personnel of the fire department, as a consequence of which, also because of the possible serious consequences of this offense, the material and personnel reliability and the integrity of the fire department were at stake.⁴³⁶ Furthermore, the selling of stolen ink cartridges concerned a serious infringement of the legal order because of the amount of stolen goods (200,000 cartridges) and the commensurate serious financial consequences for the aggrieved company.⁴³⁷ In contrast, however, the case where someone had been caught at Schiphol Airport with 2.2 kg of cocaine—a first

⁴³² Knigge and Kwakman 2001, 131.

⁴³³ Bokhorst et al. 2002, 53.

⁴³⁴ Krommendijk et al. 2009, 21 and Supplement to 'Handboek voor de opsporingspraktijk' (2004), *Stcr.* 10 December 2007, no. 239/p. 11, 2.

⁴³⁵ *Kamerstukken II* 1996/97, 25 403, no. 3, 24-25.

⁴³⁶ HR 21 November 2006, *NJ* 2007, 233, para 3.5. See also: Blom 2007, 626 ff.

⁴³⁷ HR 30 March 2010, *NJ* 2010, 201.

offender—did not constitute a serious infringement of the legal order.⁴³⁸ Hence, it follows that crimes that do not have a serious character in themselves may in the context of other facts and circumstances result in a serious infringement of the legal order.

With regard to the persons who can be subjected to SIT in the context of a criminal investigation into organized crime under Title V the reasonable suspicion must demonstrate the involvement of these persons in committing or planning serious crimes in an organized context. According to the legislature, this ‘involvement’ requires more than a coincidental involvement in the criminal activities of the group, which may be proven on the basis of facts and circumstances demonstrating more than incidental contacts with the criminal organization or its members. This does not necessarily require that someone is consciously involved in the group.⁴³⁹

In practice the standard of application of ‘a reasonable suspicion that crimes are being planned or committed in an organized context’ is used in situations where an organized context is assumed, but there is insufficient information as to the role of different people involved with regard to which crimes. As soon as more information is available and a reasonable suspicion can be established, there is usually a switch to an investigation under Title IVa.⁴⁴⁰ In other situations, it starts with a classical investigation under Title IVa and, when the information collected in this investigation points to the presence of a larger organizational context, there is then a switch to an investigation under Title V with a broader investigative focus.⁴⁴¹ There are also criminal investigations that retain their broad focus under Title V in order to continue to investigate the organization as a whole.⁴⁴²

Nevertheless, on the basis of research into the situations where Title IVa or Title V is used, a clear dividing line between the investigative domains cannot be identified. The purpose of the investigation, either being focused on one or more concrete suspects or being focused on getting a better picture of a criminal organization and its activities as a whole, seems to be the main difference between the investigative domains. Also according to the legislature, deciding whether an order to use SIT shall be based upon the provisions under Title IVa or under Title

⁴³⁸ HR 16 November 2004, *NJ* 2005, 171. See, furthermore, HR 22 March 2011, *NJ* 2011, 144, para 2.3.1, 2.3.2 and 2.5 where the Supreme Court considered that serial poaching, in an organized context, amounted to a serious infringement of the legal order. The Court of Appeal of Amsterdam rejected that fact that the offense of social security fraud (without other facts and circumstances) was a serious infringement of the legal order (Gerechtshof Amsterdam 24 June 2004, *NJ* 2004, 531) and, likewise, the District Court did not accept that breaking and entering was a serious infringement of the legal order (Rechtbank ‘s-Gravenhage 15 January 2004, *NJ* 2004, 276).

⁴³⁹ *Kamerstukken II* 1996/97, 25 403, no. 3, 23.

⁴⁴⁰ Beijer et al. 2004, 111 and Krommendijk et al. 2009, 46-47.

⁴⁴¹ Krommendijk et al. 2009, 41-44.

⁴⁴² Krommendijk et al. 2009, 44-46.

V depends on the purpose of the investigation.⁴⁴³ This was also affirmed by the Court of Appeal of The Hague in the terrorism case of *Piranha*, noting that the investigative domains of Title IVa and Title V do not necessarily differ as to the investigative phase, but do differ on the basis of the purpose of the investigation.⁴⁴⁴ Nevertheless, in another case addressing the question whether the reasonable suspicion as applicable under Title V had been met, the facts and circumstances used to establish the reasonable suspicion did not include a specific ‘broader’ investigative goal and could likewise be used to meet the threshold for using SIT under Title IVa.⁴⁴⁵

It must also be noted that it has followed from empirical research covering the period 2004–2006 that the investigative domain of Title V is rarely used and that the investigation of organized crime usually occurs under Title IVa upon the establishment of a reasonable suspicion of a crime.⁴⁴⁶ This is possible because usually a reasonable suspicion of one or more specific crimes can also be established and the then initiated classical investigation allows, simultaneously, for obtaining more information with regard to the organizational context in which the suspects operate. In addition, most public prosecutors consider the use of SIT under Title V to be only warranted when the requirements of Title IVa cannot be met.⁴⁴⁷ For this choice also capacity and efficiency reasons may be relevant, because the criminal investigation upon a reasonable suspicion of a crime has a greater possibility of being successful in the short term.⁴⁴⁸ It seems that for the decision whether to choose for the classical investigative domain or the investigative domain for organized crime, the presence of a reasonable suspicion of a crime is more determinative than the specific investigative purpose.⁴⁴⁹

2.3.2.3.2.3 *Title Ve: The Preliminary Investigation*

The preliminary investigation is the (limited) investigation preceding a (full) criminal investigation in order to prepare for a full criminal investigation to be initiated when the threshold of ‘indications that among groups of people crimes are being planned or committed which must be of a serious nature (Article 67(1) CCP crimes; crimes for which pre-trial detention can be imposed), and, due to their nature or connection with other crimes, result in a serious infringement of the legal order’ has been fulfilled. The indications do not thus refer to a specific crime, but to groups of people, which can be related to the planning or commission of serious

⁴⁴³ *Kamerstukken II* 1996/97, 25 403, no. 3, 23–24.

⁴⁴⁴ *Gerechtshof’s-Gravenhage* 2 October 2008, *LJN* BF3987.

⁴⁴⁵ See the Opinion of the Advocate General referring to the argumentation of the Court of Appeal of Den Bosch, para 4, HR 23 October 2007, *LJN* BB3067.

⁴⁴⁶ Krommendijk et al. 2009, 38–39.

⁴⁴⁷ *Ibid.*, 53.

⁴⁴⁸ *Ibid.*, 84–86 and 97.

⁴⁴⁹ *Ibid.*, 71.

crime(s). Therefore, the preliminary investigation will be used to investigate groups of people about whom indications exist that crimes are being planned or committed within that group. Considering that the indications concern the planning or commission of crimes, the investigation can be proactive, similar to organized crime investigations. Moreover, the use of the wording ‘groups of people’ also implies a slightly less restrictive threshold than the term ‘organized context’ in the threshold for using SIT in organized crime investigations.

Facts or circumstances establishing ‘indications’ can, according to the explanatory memorandum of the Act on SIT of 1999, follow from information regarding crimes committed in a certain sector in combination with information on future criminal activities. Examples mentioned are information concerning the commission or planning of crimes within a certain group where legal and illegal activities are interwoven or the laundering of money obtained by the drugs trade in the real-estate sector.⁴⁵⁰ Instead of focusing on a specific person (Title IVa) or on persons involved in an organizational context (Title V), the focus of the preliminary investigation will be less defined by investigating a larger and ‘looser’ group of persons.⁴⁵¹ The purpose of the investigation concerns ‘preparing the criminal investigation’ by determining on what aspects the criminal investigation shall focus. This is done by investigating a large collection of persons who are not necessarily suspected or otherwise related to criminal activities through comparing and collecting information from police files and open files, because there are indications that a certain type of criminal activity is more present than average within that ‘collection’ of persons (or a branch or sector of society).⁴⁵²

It follows from the case law that crime analyses shall not be considered as a ‘preliminary investigation’. Preliminary investigative activities require a specific legal basis as provided in Article 126gg CCP, because the collecting and analyzing of personal information may concern persons who are not suspected of a crime or ‘involved’ in criminal activities as such. Crime analyses concern a simpler form of analysis without systematically comparing and collecting information. The crime analysis will be conducted to determine whether indications are present by making an inventory of police files.⁴⁵³ No case law is available in which the threshold of ‘indications’ and the relation of ‘indications’ to a ‘reasonable suspicion’ is further defined. It only follows that, for example, information from previous criminal investigations may be the reason for initiating preliminary investigations into certain groups of people in order to prepare new full criminal investigations.⁴⁵⁴ Sometimes also the presence of a reasonable suspicion has been the reason for opening a preliminary investigation.⁴⁵⁵ The threshold of ‘indications’ has been

⁴⁵⁰ *Kamerstukken II* 1996/97, 24 403, no. 3, 49-50.

⁴⁵¹ *Kamerstukken II* 1996/97, 24 403, no. 3, 23.

⁴⁵² *Kamerstukken II* 1996/97, 24 403, no. 3, 23 and 57.

⁴⁵³ HR 8 September 2009, *NJ* 2009, 427 and HR 8 April 2003, *NJ* 2003, 420.

⁴⁵⁴ Gerechtshof ‘s-Gravenhage 31 May 2002, *LJN* AE3708.

⁴⁵⁵ Rechtbank ‘s-Gravenhage 21 November 2000, *LJN* AA 8414.

interpreted more precisely in the case law concerning special criminal law, which will be dealt with in the subsequent section.

Nevertheless, taking into account the purpose and the scope of the threshold which is applicable to the preliminary investigative domain, it is clear that this threshold has a significant wider reach. Personal information relating to persons not suspected of committing a crime or of being ‘involved’ in an organizational context may be collected from police files or open sources and compared. Furthermore, although also indications shall follow from facts and circumstances, it is clear that the legislature intends to establish a ‘lower’ threshold than a reasonable suspicion. From the explanatory memorandum it follows that these indications shall point to the presence of criminal activities ‘more than on average’ in a certain sector or branch of society and, considering the applicable threshold, these indications shall point to serious crimes.

2.3.2.3.2.4 *The Threshold of Indications in Special Criminal Acts*

In some of the special criminal Acts the threshold of indications suffices for the use of search powers. The Economic Offences Act (WED) permits investigative officers that have the authority to investigate economic offenses to apply investigative powers—such as seizure, entering any place and investigating objects and vehicles—if these powers are in the interest of the investigation and the use thereof is reasonably required for the fulfillment of their investigative task (Articles 18-23 WED). In the case law ‘the interest of the investigation’ has been explained as requiring indications that an economic offense (as enumerated in Article 1 and 1a of the Act) has been committed. Furthermore, the Weapons and Ammunition Act (WWM) allows investigative officers to apply investigative powers such as searching vehicles and luggage when there is ‘reasonable cause to do so upon indications that a crime will be committed with the help of weapons or upon indications that someone will be in the possession of a weapon of a specific category’ (Articles 50-52 WWM). Further guidance can be derived from the case law with regard to the interpretation of the threshold of ‘indications’ and the relation of this threshold applied for the criminal investigation of offenses criminalized in special criminal law to the reasonable suspicion threshold as applied in classical criminal investigations.

In a case concerning the power to search vehicles under Article 23 WED the Supreme Court upheld the judgment of the Court of Appeal that the criminal investigation of offenses criminalized in the WED cannot remain limited to a concrete suspicion. The interest of the criminal investigation justifies the use of the power to search when there are indications that an economic offense has been committed. According to the Court of Appeal, the language used in Article 23 WED cannot be explained as requiring a reasonable suspicion under Article 27 CCP.⁴⁵⁶ The Supreme Court referred in its judgment to the explanatory

⁴⁵⁶ HR 9 March 1993, *NJ* 1993, 633, para 7-9.

memorandum of the WED in which it was explicitly explained that the criminal investigation of offenses criminalized in the WED could not be restricted to situations in which a reasonable suspicion can be established. If there are indications that an economic offense has been committed, the interest of the investigation justifies the use of investigative powers to clarify these indications and to investigate whether an economic offence has in fact been committed.⁴⁵⁷ Hence, 'indications' seem to provide for a lower standard than a 'reasonable suspicion.'

Furthermore, a case heard by the District Court of Amsterdam in 2007 demonstrated that the single observation of investigative officers that someone had been fishing did not establish indications that an economic offense had been committed. The Court added that the fact that the investigative officers knew that the person in question had violated fishing regulations in the past did not affect this decision.⁴⁵⁸

Although the investigative powers on the basis of the Hunting Act are currently no longer in force—the criminal investigation of the offenses criminalized by this Act (currently by the Flora and Fauna Act) is now covered by the Economic Offenses Act—court decisions assessing an investigation conducted on the basis of this Act may still teach us something about the interpretation of 'indications'. Two cases concerning the investigation under this Act addressed the possible wider scope of the investigation, in the absence of a reasonable suspicion under Article 27(1) CCP. In the first place, the Advocate General concluded with regard to a Supreme Court case from 1997 that searching vehicles under the Hunting Act does not require the establishment of a reasonable suspicion. According to the Supreme Court the vehicle can be searched on the basis of information that it concerns a vehicle in which possibly objects are transported that violate the Act. The Advocate General explained the power to search in the same way as the explanation in the case law concerning Article 23 WED: upon the establishment of indications of a violation of the Act the vehicle can be searched. He continued by stating that acting in the interest of the investigation supposes that there is some cause for the investigation and that 'indications' are the bottom-line for such a cause. Furthermore, the indications do not need to establish a reasonable suspicion. In this specific case, the power to search could otherwise also be based upon Article 51(3) WWM, requiring indications that a criminal offense would be committed with the help of a weapon criminalized by the Weapons and Ammunition Act.⁴⁵⁹ Secondly, a case from 1984 illustrates that the power to search vehicles on the basis of the Hunting Act does not require that the owner of the vehicle is a suspect under Article 27 CCP. According to the Supreme Court, the legislature has aimed to create the possibility to search vehicles in which possibly objects have been transported that violate the Hunting Act, without the driver being a suspect. Investigative officers are authorized to use the power to search in order to control the observance of the Hunting Act for the purpose of tracing

⁴⁵⁷ Bijl. *Handelingen II*, 1968/69, 9608, no. 5, 2 and HR 9 March 1993, *NJ* 1993, 633, para 5.2.

⁴⁵⁸ Rechtbank Amsterdam 29 June 2007, *LJN* BA9602 en *LJN* BA9586, para 3.1.

⁴⁵⁹ HR 27 May 1997, *NJ* 1997, 550, Opinion of Advocate General Fokkens, para 11-13.

criminal offenses.⁴⁶⁰ The use of criminal investigative powers ‘in the interest of the investigation’ thus allows the application of criminal investigative powers without information providing for a nexus with a specific criminal offense.⁴⁶¹

Furthermore, case law concerning search powers under the Weapons and Ammunition Act provides for some further guidance as to the interpretation of the threshold used under that Act. In a case in 2008 on appeal from the Joint Court of Justice of the Netherlands Antilles and Aruba the Advocate General pointed out in his opinion concerning the firearms legislation of the Netherlands Antilles that the power to frisk upon indications that a crime penalized in the Act would be committed under the law of the Netherlands Antilles differed from the powers under the Dutch WWM Article 52. In Dutch law frisking could also be conducted when there are indications, a threshold which is met when there is information that someone is in possession of a firearm.⁴⁶² A Supreme Court case in 2010 has further defined the use of indications under the WWM by determining that the threshold of indications for searching a vehicle (Article 51 WWM) is met when there is a specific identifiable reason to assume that the WWM has been violated or will be violated. It is not required that there is also a specific person that can be identified as a suspect.⁴⁶³ In another case concerning the use of search powers on the basis of firearms and drugs regulations of the Netherlands Antilles, the Advocate General determined in comparison with the Dutch search powers under the WWM that, in his opinion, the difference between a reasonable suspicion and indications regarding the use of search powers is very subtle and that indications would in any case not require that the person being searched is a suspect.⁴⁶⁴

Taking into account this interpretation of ‘indications’ in the case law regarding investigative powers under special criminal law and comparing that to the interpretation given to the definition of a suspect under Article 27(1) CCP, it can be concluded that ‘indications’ (or ‘in the interest of the investigation’) is intended as a ‘lower’ standard allowing the use of powers that under the CCP can only be applied against a suspect when there is information available which contains indications that a crime, as criminalized under the WED or WWM, has been or will be committed in the future. Any difference as to the level of proof that can be derived from the facts and circumstances establishing indications or a reasonable suspicion is difficult to identify taking into account the information that may establish a reasonable suspicion of a crime (see [Sect. 2.3.2.3.1](#)) and the case law analyzed in this section. It seems that the only conclusion warranted is that

⁴⁶⁰ HR 30 October 1984, *NJ* 1985, 275, para 6.4.

⁴⁶¹ This goal of controlling the observance of a Special Act should not be confused with the ‘administrative supervision’ as part of policing tasks.

⁴⁶² This would be insufficient under the firearms legislation of the Netherlands Antilles, where indications must also be present that the firearm will in fact be used. HR 10 June 2008, *NJ* 2008, 348, Opinion of Advocate General Vellinga, para 10 and see also: *Kamerstukken II*, 1999-2000, 26 865, no. 5, 7-8.

⁴⁶³ HR 23 March 2010, *NJ* 2010, 197.

⁴⁶⁴ HR 17 October 2006, *NJ* 2007, 80, Opinion of Advocate General Wortel, para 19.

searching or frisking powers under the WED and WWM can be applied against persons who are not suspects (but when there are indications that the special criminal act has been violated), whereas searching and frisking as regulated in the CCP are limited to suspects as well as being subjected to other restrictive conditions (e.g. Articles 55a, 55b(2), 56 and 96b CCP).⁴⁶⁵ Nevertheless, the reasonable suspicion threshold used under Title IVa allows the use of SIT against persons who are not suspected of a crime.

2.3.2.3.2.5 Other Degrees of Suspicion and Supplementary Conditions

It follows from the regulation of SIT, other investigative methods and the preliminary investigation that investigative powers that result in a more severe infringement of the right to respect for private life are subjected to more stringent conditions as to their application. As a general rule all SIT are subjected to the requirement that the SIT is used ‘in the interest of the investigation’. For some techniques, such as wire-tapping (Articles 126m and 126t CCP) and infiltration (Articles 126h and 126p CCP), there must be a ‘pressing’ investigative need for using the SIT in the interest of the investigation. This requirement implies an assessment as to whether the use of the SIT is also, in the context of the specific circumstances of the criminal investigation in question, in accordance with the principles of proportionality and subsidiarity.

For the SIT that result in the least serious interference with the right to respect for private life, such as systematic observation (Articles 126g and 126o CCP), meeting the threshold of a reasonable suspicion of either a crime (under Title IVa) or that crimes are being planned or committed in an organized context (under Title V) and using the SIT in the interest of the criminal investigative purpose is sufficient for applying the technique. For some of the more intrusive techniques additional requirements also apply. For example, for entering places under Title IVa, the reasonable suspicion shall concern a serious, Article 67 crime (Article 126k CCP). For the most intrusive SIT, which are wire-tapping and infiltration (Articles 126m CCP and 126h CCP), the suspected crime shall also result in a serious infringement of the legal order, because of its nature or its relation with other crimes. As explained in [Sect. 2.3.2.3.2.2](#), the conditions of serious (article 67 CCP) crimes and a ‘serious infringement of the legal order’ apply to all SIT regulated under Title V in order to impose an additional restriction on the more intrusive nature of the proactive use of SIT, which is possible under Title Vb considering that the reasonable suspicion may concern the ‘planning or commission of crimes’.

Furthermore, outside the context of the use of SIT in the investigative domains of Title IVa and Title V, also some other investigative methods have been specifically regulated in the CCP or in special criminal law. Other investigative and

⁴⁶⁵ With the exception of searching and frisking powers introduced by the Criminal Investigation of Terrorist Crimes Act (2006). These powers will be dealt with in the next chapter.

coercive methods specifically regulated in the CCP are, for example, arrest (Articles 53 and 54 CCP), frisking and strip searching (Article 56(1) CCP), a body cavity search (Article 56(2) CCP) and pre-trial detention (Articles 57-58, 63-67a CCP). For the methods that seriously intrude onto the rights and liberties of the person involved, a stronger version of a reasonable suspicion is required. For example, the powers to frisk, strip search, to conduct body cavity search and pre-trial detention can only be used upon the establishment of ‘serious concerns’ [*ernstige bezwaren*].

2.3.2.3.3 The Protective Function of the Suspicion Threshold

The threshold of suspicion, in its different degrees, but primarily as defined in Article 27(1) CCP, has obtained its central position in the regulation of criminal procedural powers to reflect respect for the right to privacy and for the presumption of innocence. The threshold of a reasonable suspicion has been adopted in order to protect against arbitrary interferences with the right to private life and, hence, to prevent unnecessary interferences with private life and to protect the innocent against any interference.

Restrictions to the right to respect for private life under Article 8 ECHR may only be made when they are ‘in accordance with the law’ and ‘necessary in a democratic society’. The specific regulation of the various investigative domains in the CCP providing for the conditions under which SIT may be applied reflects this requirement of providing for restrictions only ‘in accordance with the law.’ As has been explained in [Sect. 2.3.2.1.1](#), ‘in accordance with the law’ requires a law of a certain quality in the sense that it is accessible to and foreseeable for the person concerned. Subjecting the use of SIT to a certain threshold reflecting a degree of suspicion is intended to make it foreseeable when the government may use SIT which interferes with the private life of the person concerned. Once there is a case of involvement in criminal activities, one can foresee that the government may start a criminal investigation into these activities, an investigation which may include the use of SIT which interfere with the right to respect for private life. Furthermore, subjecting the use of SIT to a specific threshold reflecting a degree of suspicion in relation to criminal activities limits the use of criminal investigative powers to establishing the truth with regard to those criminal activities. Governmental action in the field of criminal procedural law has been considered necessary in a democratic society. Hence the reasonable suspicion requirement, limiting interference with the right to respect for private life to the purpose of the criminal law enforcement, also meets the requirement of being ‘necessary in a democratic society.’

The presumption of innocence, as described in the introductory section ([Sect. 2.1.3.3.1](#)), protects against arbitrary interferences by the government in general; it protects the innocent from interferences with their rights and liberties. In the Netherlands this principle is traditionally guaranteed during the criminal investigation by requiring a reasonable suspicion before the use of SIT with far-reaching consequences for the rights and liberties of the persons investigated is

permitted. The threshold of a reasonable suspicion as the central threshold for using investigative or coercive methods against someone was already introduced during the drafting process of the current CCP that entered into force in 1926. The explanatory memorandum of 1914 formulated as the goal of the criminal justice system to pursue the conviction of those guilty of having committed a criminal offense and to avoid subjecting the innocent to conviction and prosecution. From the latter, it can be derived that within the administration of criminal justice it must also be avoided that the innocent are subjected to investigative powers unnecessarily.⁴⁶⁶ A balance must be struck between the interest of the investigation in the specific circumstances and the risk that innocent persons are subjected to investigative powers. This is deemed to be guaranteed by establishing the threshold of a reasonable suspicion. The explanatory memorandum of 1914 acknowledged that the state of a reasonable suspicion would create awareness among people that also the suspect, who is brought to trial, is only under a suspicion as to his guilt. The explanatory memorandum further explains that using far-reaching investigative powers against someone such as arrest, strip searches, or pre-trial detention is only possible against a person relating to whom such a reasonable suspicion can be established.⁴⁶⁷

The threshold of a suspicion thus fulfills an important restrictive and protective function of the use of criminal procedural powers. The specific degree required for the use of specific investigative techniques is, therefore, explicitly related to the level of intrusion on privacy caused by using the technique and the commensurate level of protection against involving the innocent in the investigation. Also the ECtHR has related the level of protection to be offered by the regulation to the level of the intrusion. With regard to wire-tapping, the ECtHR decided in *Kruslin/Huwig v. France* that the serious intrusion on the right to respect for private life caused by wire-tapping without permission is in principle acceptable considering the interest of the investigation, but must then be surrounded by sufficient safeguards to counterbalance the interference with private life.⁴⁶⁸ This would require a legal basis for the investigative method that is “particularly precise”, a requirement not met by the French law in question.⁴⁶⁹ In the Dutch regulation of investigative methods the relation between the suspicion and the level of intrusion follows, for example, from allowing preliminary investigative activities on the basis of indications, from the requirement that the reasonable suspicion shall concern serious (Article 67 CCP) crimes and from requiring ‘serious concerns’ for, inter alia, frisking and pre-trial detention.

⁴⁶⁶ Rozemond 1998, 359.

⁴⁶⁷ Vaststelling van een Wetboek van Strafvordering, Memorie van toelichting [Explanatory Memorandum for Establishing a Code of Criminal Procedure 1912-1913], in: Lindenberg 2002, 436.

⁴⁶⁸ ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huwig v. France*), para 33/32.

⁴⁶⁹ ECHR 24 April 1990, App. no. 11801/85 and App. no. 11105/84 (*Kruslin v. France and Huwig v. France*), para 33/32 and 36/35.

Lastly, as already indicated in [Sect. 2.3.2.3.1](#), the definition of a suspect under Article 27(1) CCP also has important protective consequences for the person meeting this definition. Once labeled as a suspect, all kinds of procedural rights are attributed.⁴⁷⁰ However, these procedural rights will not be relevant for the assessment of the criminal investigation in this project, as it focuses on the covert phase of investigation where the suspect will not yet be aware of the investigation against him/her. Moreover, particularly this phase of the investigation will not be directed only against persons meeting the definition of Article 27(1) CCP.

2.3.2.4 Other Protective Elements Adopted in the CCP

2.3.2.4.1 The Duty to Compile Records

The duty to compile records concerns an important protective element in the system of the regulation of the criminal investigation, considering the importance of this duty for providing a transparent criminal justice system and effectuating defense rights in the trial phase. The duty to compile records is in particular important considering the importance of the pre-trial phase for the investigation at trial, as a consequence of the Supreme Court decision regarding *de auditu* testimony.⁴⁷¹ When the trial phase focuses on the verification of the evidence obtained during the pre-trial phase, it is very important that the manner in which evidence has been obtained has been correctly and completely reported. Furthermore, the duty to compile records fulfills an important role with regard to the supervision of the public prosecutor and, when the examining magistrate is involved, also with regard to the controlling function of the examining magistrate. The police reports enable decisions to be made as to the termination of the criminal investigation or initiating specific additional investigative activities and enable the exertion of control over the investigative activities conducted by the police.

The duty to compile records is provided in Article 152 CCP. All officers responsible for the criminal investigation (those investigative officers that are enumerated in Articles 141 and 142 CCP) are obliged to report all their activities and findings during the criminal investigation as soon as possible. If a law enforcement officer deliberately omits to compile records of relevant information, he is contravening his legal duty to compile records and is committing perjury.⁴⁷²

⁴⁷⁰ These procedural rights are mainly relevant for those suspects who are arrested or detained pre-trial. For the suspect (or other person) under investigation, these rights will not yet take effect, considering that the application of investigative powers will be covert. A different threshold than a reasonable suspicion for coercive measures such as arrest is therefore impossible. However, a different view can be defended for the threshold of application concerning investigative powers in the pre-trial investigation, a threshold which should therefore be considered as flexible. See also: Knigge 2005, 360.

⁴⁷¹ See [Sect. 2.1.2](#).

⁴⁷² See in this regard: HR 7 February 2006, *NJ* 2007, 396, para 3.3 and 3.4.

This duty to compile records is further defined in Article 153 CCP, requiring that the report is made under oath of office or under solemn affirmation. Article 153 CCP also requires that the investigative officer discovering the information compiles the official report personally. Furthermore, this investigative officer must date and sign the report as well as reflect as much reasons as possible for his knowledge. For public prosecutors the duty to compile records is laid down in Article 148(3) CCP: the public prosecutor must compile official reports, under his oath of office, of all investigative activities conducted personally.

The duty to compile records has since the first version of the CCP of 1926 functioned as a protective procedural safeguard as it was included as a duty for public prosecutors and other investigative officers.⁴⁷³ The duty to compile records applies, according to Article 152, to the criminal investigation. However, the Supreme Court has decided in the *Zwolsman* judgment that in all circumstances—within or outside the formal scope of the criminal investigation—the duty to compile records must be observed in case the information is required in order to enable the trial judge to make a final judgment, in accordance with the requirements of a fair trial, concerning the legitimacy of the investigation and the reliability of the evidence obtained.⁴⁷⁴ Because of the limited interpretation of the criminal investigation before 1999, the duty to compile records did not apply to the proactive phase and, consequently, was one of the reasons for the secretive and uncontrolled use of investigative powers in the proactive phase.⁴⁷⁵

Considering the important role of the reports regarding the criminal investigative activities for the control exerted in the trial phase as to the legitimacy of these investigative activities and the veracity of the information obtained by these activities, the official report must include all findings (incriminating and exonerating) that are relevant for a judgment about the investigation itself and the value of the evidence obtained and must include a description of the investigative powers applied insofar as a determination on its legitimacy is required.⁴⁷⁶ Generally speaking, everything which is relevant for future decisions and judgments falls within the scope of the duty to compile records.

Furthermore, any use of investigative powers that result in an infringement of the privacy rights of people—regardless of the gradation—must be included in official reports. This applies in all circumstances to the use of SIT, as explicitly provided in Article 126aa CCP.⁴⁷⁷ However, Article 126aa CCP does not apply to the preliminary investigation.⁴⁷⁸ In the light of the criterion formulated in the *Zwolsman* case that all information which is relevant for enabling the trial judge to

⁴⁷³ Lindenberg 2002, 421.

⁴⁷⁴ HR 19 December 1995, *NJ* 1996, 249, ann. Sch para 11.2.2. See also: Rozemond 2000.

⁴⁷⁵ Rapport van de Parlementaire Enquêtecommissie Opsporingsmethoden 1996, 432-433.

⁴⁷⁶ Aanwijzing opsporingsbevoegdheden, *Stcrt.* 2004, 227.

⁴⁷⁷ Aanwijzing opsporingsbevoegdheden, *Stcrt.* 2004, 227.

⁴⁷⁸ Article 126aa CCP applies to the investigative powers under Title IVa-Vc (see Article 126aa(1) CCP).

make a final judgment, including with regard to the legitimacy of the criminal investigation, must be reported, arguably the preliminary investigative activities shall nevertheless be covered by the duty to compile records. Article 126aa CCP requires that the public prosecutor discloses any reports that relate to the use of SIT. According to Article 126aa(4) CCP, when no official report has been disclosed regarding the use of SIT, at least notification of the use of the method must be made in the dossier.⁴⁷⁹ The explanatory memorandum further explains that the reporting must take place regardless of the extent to which the use of SIT is relevant for the case and, hence, the use of SIT cannot be kept secret from persons being prosecuted.⁴⁸⁰ In this regard, the duty to compile records regarding SIT is stricter than the duty to compile records concerning other findings during the criminal investigation in order to enable *ex post* control over the legitimacy of using special investigative techniques.

The duty to compile records as provided in Article 152 CCP and, specifically for the use of SIT, in Article 126aa CCP serves an important protective role, facilitating control both during the criminal investigation and at trial. The public prosecutor and, sometimes, the examining magistrate use the written reports as the basis for exerting control over the fairness and the legitimacy of the criminal investigation. *Ex post*, at trial, the written reports drawn up under this duty provide the defense with the possibility to challenge the legitimacy of the use of investigative powers and enable the controlling function of the trial judge concerning the events of the criminal investigation. This protective function of the duty to compile records is, however, not always effectuated in the form of procedural remedies, considering that the consequences of failing to compile records may be limited. This subject will be dealt with in more detail in the subsequent section.

2.3.2.4.2 The Remedies of Article 359a CCP

Only since a Supreme Court decision of 1962 involving the testing of blood without the permission of the suspect, can the trial judge attach consequences to any established illegitimate action during the criminal investigation.⁴⁸¹ Previous to this, the trial judge would only assess challenges regarding the veracity of the evidence obtained during the criminal investigation. The Act on Noncompliance with Procedural Requirements [*Vormverzuimen*] of September 14, 1995, established Article 359a CCP, providing a statutory basis for the power of the trial judge to sanction noncompliance with procedural requirements during the pre-trial phase. Noncompliance with procedural requirements covers the violation of

⁴⁷⁹ Article 126aa(4) CCP.

⁴⁸⁰ *Kamerstukken II* 1996/97, 25 403, no. 3, 16.

⁴⁸¹ HR 26 June 1962, *NJ* 1962, 470 ann. WP. The use of evidence obtained by an investigative method that illegitimately—because a statutory basis was lacking—intruded upon someone's physical integrity violated the rights of the defense and, therefore, the results of the blood test had to be excluded as evidence.

statutory requirements which are applicable to the use of investigative methods, for example, the use of investigative methods in the absence of a reasonable suspicion⁴⁸² or nonobservance of the duty to report the investigative activities, in particular the use of SIT.⁴⁸³ In addition, also investigation in violation of the principles of the due administration of justice concerns a violation of procedural requirements.⁴⁸⁴ Sometimes, the noncompliance with procedural requirements, e.g. in violation of statutory requirements or a violation of the principles of proportionality and subsidiarity, also amounts to a violation of a right protected in the ECHR, in the context of the criminal investigation most likely Article 8 ECHR.⁴⁸⁵ Since the adoption of Article 359a in the CCP, the trial judge exerts his controlling function within the context of this statutory framework. Nevertheless, it shall be taken into account that the trial judge will only actively investigate events during the pre-trial phase when a defense is raised in that regard or *ex officio* in the exceptional situation that the use of the investigative power seems to be clearly illegitimate. Moreover, as already explained in [Sect. 2.3.1.3](#), when the examining magistrate has already been involved in the criminal investigation, in particular for the authorization of an investigative method, the trial judge will only examine

⁴⁸² See e.g. Gerechtshof Amsterdam 3 June 1977, *NJ* 1978, 601. The evidence was excluded as a consequence of the use of investigative methods in the absence of a reasonable suspicion. See also, HR 24 February 2004, *NJ* 2004, 226, para 3.6, where the Supreme Court did not exclude the evidence, because the evidence had not been obtained through the alleged illegitimate arrest. Because of this conclusion, the Supreme Court did not reach the merits of the question whether the arrest was illegitimate because a reasonable suspicion was lacking. And: HR 6 September 2005, *NJ* 2006, 447, para 3.6: in this case the use of a blood test in the absence of a reasonable suspicion, but with the permission of the person in question, violated statutory law. The Supreme Court upheld the decision to mitigate the sentence, instead of imposing the more 'severe' sanction of excluding the evidence, because the person's physical integrity had not been violated without his permission.

⁴⁸³ For example HR 19 December 1995, *NJ* 1996, 249, ann. Sch, para 11.3, HR 30 June 1998 *NJ* 1998, 799 ann. Sch, para 9.5, HR 2 November 1999, *NJ* 2000, 162, para 5.3 and 5.4 and HR 30 November 1999 *NJ* 2000, 344 en 345 ann. Mevis, where the court did not impose sanctions because the nonobservance of the duty could be repaired and had not been done intentionally or in order to substantially limit the controlling function of the judge.

⁴⁸⁴ See e.g. HR 12 February 2008, *NJ* 2008, 248, para 4.3, an arrest in violation of the principles of the due administration of justice did not have to result in the sanction of barring the prosecution, because this violation did not deprive the defendant of her right to a fair trial. And HR 14 January 2003, *NJ* 2003, 288, where the Supreme Court acknowledged that violations of the principles of the due administration of justice by investigative officers as well as by actions of private persons may be sanctioned; in this case the respective violations of the principles of the due administration of justice (as well as Article 8 ECHR) were not of such a nature that excluding the evidence or barring the prosecution should follow (*Ibid.* para 3.6, 4.3 and 4.4).

⁴⁸⁵ See e.g. HR 18 March 2003, *NJ* 2003, 527, para 3.5.1, where the method of collecting evidence (by a private detective) may have violated Article 8 ECHR, but did result in a violation of the principles of the due administration of justice or the rights of the defense in such way that the exclusion of the evidence was warranted.

whether the examining magistrate could reasonably reach such a decision on authorization, whether the public prosecutor has executed the order legitimately and whether the use was also otherwise legitimate.⁴⁸⁶ When the special investigative technique challenged has been used solely on the basis of the order of the public prosecutor, the trial judge will examine more in depth whether the public prosecutor could order the use of the investigative technique and whether the use as a whole was legitimate. According to the explanatory memorandum of the Act on Strengthening the Position of the Examining Magistrate, because of the enhanced role of the examining magistrate during pre-trial, the trial judge may exercise more restraint when assessing challenges regarding illegitimate actions during the criminal investigation.⁴⁸⁷

In a decision on March 30, 2004, the Supreme Court formulated general rules as to the scope and applicability of Article 359a CCP. Only when the noncompliance with procedural requirements results in irreparable consequences for the defense may the trial judge impose procedural sanctions, and he or she has rather broad discretion as to whether or not to attach consequences to established illegitimate actions.⁴⁸⁸ For example, when reports of the use of investigative methods during the criminal investigation have not been disclosed in the file, the public prosecutor will have the opportunity to rectify this violation of the duty to compile records before considering any possible procedural sanctions.⁴⁸⁹ Article 359a provides for the following possible remedies: mitigation of the sentence; exclusion of the evidence obtained through noncompliance with procedural requirements; and the most drastic: barring the prosecution.⁴⁹⁰

According to the Supreme Court the trial judge shall take into account the interests served by the rule that is not observed, the damage resulting from the noncompliance and the seriousness of the noncompliance in order to decide whether a procedural sanction should follow and to choose between the possible sanctions.⁴⁹¹ According to the Supreme Court, a mitigation of the sentence will only be resorted to when: the suspect has actually experienced harm; this harm is the consequence of the noncompliance with the procedural requirements; the harm can be compensated through the sentence being mitigated; and, mitigating the sentence is also justified considering the interest of the rule that is not observed

⁴⁸⁶ See Sects. 2.3.1.2 and 2.3.1.3 and compare: HR 11 October 2005, *NJ* 2006, 625, para 3.5.2 and HR 21 November 2006, *NJ* 2007, 233, ann. Mevis, para 3.4.

⁴⁸⁷ *Kamerstukken II* 2009/10, 32177 no. 3, 18.

⁴⁸⁸ Which would thus also imply (without the sanctioning) a violation of Article 6 ECHR. See HR 30 March 2004, *NJ* 2004, 376, para 3.4.3.

⁴⁸⁹ Compare: HR 19 December 1995, *NJ* 1996, 249, ann. Sch, para 11.3, HR 30 June 1998, *NJ* 1998, 799 ann. Sch, para 9.5, HR 2 November 1999, *NJ* 2000, 162, para 5.3 and 5.4 and HR 30 November 1999, *NJ* 2000, 344 en 345 ann. Mevis.

⁴⁹⁰ Article 359a(1) CCP. See in general on noncompliance with procedural requirements and the procedural sanctions of Article 359a: Franken 2004A.

⁴⁹¹ Article 359a(2) CCP and HR 30 March 2004, *NJ* 2004, 376, para 3.5.

and considering the seriousness of the noncompliance.⁴⁹² For example, this means that in the case of an illegitimate search of a house that is not owned by the defendant, no consequences will be attached to this illegitimate search because the violated rule did not protect the interests of the defendant; no actual harm was suffered by the defendant as such.⁴⁹³ The exclusion of evidence will only occur when the evidence has also been directly obtained through the illegitimate action and the illegitimate gathering of the evidence has considerably violated an important criminal procedural requirement or legal principle.⁴⁹⁴ Only in rare situations will the prosecution be barred: when the investigative officers have seriously violated the fundamental principles of legitimate criminal investigation, resulting in a shortcoming in the suspect's enjoyment of his/her right to a fair trial and this shortcoming was either intended or was the consequence of the interests of the suspect having been gravely disregarded.⁴⁹⁵ The Supreme Court, furthermore, has explained that a trial judge is only obliged to take a decision under Article 359a CCP when the defense has pleaded noncompliance and this plea must be well grounded on the basis of the relevant facts.⁴⁹⁶ Most important for the trial judge confronted with a challenge as to illegitimate investigative actions in the light of Article 359a is to assess whether rights have been impaired and whether procedural sanctions can rectify this impairment in order to render the proceedings as a whole fair.

2.3.3 Conclusion

The second part of this chapter has described an interrelated system of shared and hierarchal attributed responsibilities as well as protective and restricting elements, which are jointly intended to function as safeguards against arbitrary and unnecessary interferences with the right to respect for private life and against unfair criminal proceedings.

The truth-finding actors—the police, the PPS and the examining magistrate—operate in a hierarchical structure, with an increasing assumption of being objective and impartial when it comes to the decision on employing a specific investigative method. The decision to employ investigative methods based on Article 2 Police Act 1993 is entrusted to investigative officers, the decision on using SIT is entrusted to the public prosecutor and the use of the most intrusive SIT requires the authorization of the examining magistrate. The responsibility for

⁴⁹² HR 30 March 2004, *NJ* 2004, 376, para 3.6.3.

⁴⁹³ HR 30 March 2004, *NJ* 2004, 376, para 4.4.

⁴⁹⁴ HR 30 March 2004, *NJ* 2004, 376, para 3.6.4.

⁴⁹⁵ HR 30 March 2004, *NJ* 2004, 376, para 3.6.5, firstly adopted in *Zwolsman*, HR 19 December 1995, *NJ* 1996, 249, ann. Sch.

⁴⁹⁶ HR 30 March 2004, *NJ* 2004, 376, para 3.7.

overall control over the criminal investigation is shared between the public prosecutor and the examining magistrate. The public prosecutor, as the supervisor of the criminal investigation, has obtained—with the entry into force of the Act on SIT of 1999—the most central role in the criminal investigation. He is required to ensure that the investigative officers operate within the confines of the law, in observance of the principles of proportionality and subsidiarity and in anticipation of the trial phase, where accountability for the course of events during the criminal investigation needs to be achieved. In addition, the examining magistrate has, next to his/her role as a warrant judge, a general role to oversee the efficient course of the criminal investigation. As a consequence of the Act on Strengthening the Position of the Examining Magistrate, the independent controlling responsibility of the examining magistrate, next to the supervisory role of the public prosecutor, has been given more emphasis. Nevertheless, his/her control function remains largely dependent on the information provided by the police and PPS and is affected by a rather high caseload.

The framework in which the actors operate, both with regard to the application and with regard to the manner in which control is exerted, is provided in the CCP. Some specific conditions that the regulation of investigative methods which interfere with the right to privacy must meet follow from Article 8 ECHR. The main implication of these requirements concerns the specific provisions for SIT and the proactive preliminary investigative methods and the possibility to base those investigative methods that do not, or to a limited extent, interfere with privacy on Article 2 Police Act 1993. The reasonable suspicion threshold has traditionally functioned as the crucial restriction to achieve protection against arbitrary and unnecessary interferences with the right to respect for private life. However, as has followed from the description of different varieties of the suspicion threshold in 2.3.2.3 and considering the current definition of criminal investigation, the idea that the definition of Article 27(1) CCP has a central protective function is currently difficult to uphold. In addition, also the protective ability of the reasonable suspicion threshold may be doubted, considering that the threshold can be met by ‘soft’ information originating from anonymous sources, such as an anonymous tip-off and CIE or AIVD reports. The threshold has been given a flexible interpretation, for which reason the legislature has taken into account factors such as the seriousness of the crimes and the nature of the investigative technique to deviate from the Article 27(1) CCP suspicion threshold, and for which reason the actors seeking to use an investigative technique on the basis of particular ‘facts and circumstances’ may take into account the contents of the information, whether the police and/or PPS have independently checked the information, the concrete possibilities to verify the information considering a possible need to act with urgency, and the availability of less-intrusive means to achieve the investigative purpose.⁴⁹⁷ Hence, in addition to this ‘threshold of application’, the principles of proportionality and subsidiarity and the principle of

⁴⁹⁷ For the latter compare HR 11 March 2008, *NJ* 2008, 329, ann. Borgers, annotation para 6.

purpose limitation are intended to fulfill an important additional restrictive function to protect against abuse in the discretionary area provided to the investigating police and PPS also under the applicability of the suspicion threshold or other varieties of the suspicion threshold.

On the basis of the principle of purpose limitation, the criminal investigation has also been separated from administrative supervisory authority and from intelligence investigations. For the intelligence investigation the purpose limitation principle applies strictly, resulting in a strict separation between the intelligence and law enforcement community, following from a prohibition on using intelligence powers for the purpose of criminal investigation. Administrative supervision and criminal investigation are separated on the basis of a looser application of the purpose limitation rule. Administrative supervisory powers may also be used for criminal investigative purposes as long as these administrative supervisory powers are not used exclusively to pursue criminal investigative purposes. Because of this looser application of the purpose limitation rule, the use of administrative supervisory powers against suspects also triggers the applicability of procedural rights for the suspect, such as the right to remain silent. Nevertheless, the applicability of the purpose limitation does not obstruct the use of information collected either by administrative supervisory powers or in intelligence investigations within the criminal investigation. When the administrative supervision switches to a criminal investigation or when 'spheres cumulate', such a transfer of information occurs automatically, especially considering that usually the same investigative officer will be active in both spheres. In contrast, the transfer of information from the AIVD to the PPS is a decision made solely by the AIVD and occurs through the procedural mechanism provided in the WIV 2002 (AIVD official reports are transferred to the PPS through the intermediary of the national public prosecutor for counterterrorism) in order to uphold the strict separation between the intelligence community and law enforcement community and to exclude the AIVD's secret methods of operating from the transparency requirements of criminal procedures.

Lastly, control over the legitimate and fair course of the criminal investigation has been hierarchically organized. During the criminal investigation the PPS and the examining magistrate bear this controlling responsibility as to whether the criminal investigative powers are used within the confines of the law and, in addition, in observance of the principles of the due administration of justice. Afterwards, the trial judge shall be enabled to exert full control over the course of events during the criminal investigation and the defense can challenge the evidence collected during the criminal investigation, as required under Article 6 ECHR. For this purpose, the trial judge and defense shall, in principle, have sufficient insight into the manner in which the evidence has been obtained and the source of the evidence. For this purpose, the police and PPS have a duty to compile records of all investigative activities relevant for a judgment regarding the legitimacy of the criminal investigative activities and the defense has a right to have these materials disclosed. The level of control that the trial judge is required to exert depends on the level of control that has already been or could have been

exerted during the criminal investigation. In other words, the control on the fairness of the criminal proceedings exerted by the judiciary must be kept in balance. Considering the manner in which the Supreme Court has interpreted the framework of Article 359a CCP, the establishing, at the trial stage, of illegitimate actions which have occurred during the criminal investigation do not necessarily result in a procedural remedy for the accused. Only when such a remedy is required in order to render the trial fair and the remedy is suitable for repairing the fairness of the criminal procedure as a whole, will the judge apply one of the procedural sanctions.



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