3 Infiltrating organized crime groups: theory, regulation and results of a last resort method of investigation

This chapter gives insight into the Dutch investigative practice of a specific type of undercover police strategy: infiltration. Infiltration is legally the most serious kind of undercover operation, which is mainly deployed against organized crime. Based on research covering all infiltration operations in the Netherlands during the 2000-2005 period, this chapter provides empirical insight into the use of this ‘last resort’ method of investigation. It looks into the numbers, course and results of infiltration operations but also into the practical outcomes of formal, regulatory requirements.

3.1 Introduction

The purpose of this chapter is to give empirical insight into the investigative practice in the Netherlands of an undercover police strategy that is used against organized crime: infiltration. During an infiltration operation, an undercover police officer (undercover agent) takes part in a criminal organization or a criminal group.

Organized crime, as a policy issue, has a prominent position on the political agenda. As a topic of scientific research, organized crime also has a history that spans several decades (Paoli and Fijnaut, 2004a; Kleemans, 2012). However, when it comes to investigative methods that are used against organized crime, empirical research is scarce.

For criminologists, criminal investigation is a relatively neglected field of research, especially when organized crime is concerned (Grabosky, 2010: 364; see also De Poot, 2010: 102). When looking at the most-cited scholars and their most-cited works, it is clear that criminologists focus on criminals (and their treatment) rather than on criminal

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investigation (Cohn and Farrington, 2012). Others, e.g. Brown et al. (2012: 1), have pointed out the fact that the evidence base on how the investigative process works is growing, but that research on investigative methods focuses on scientific techniques such as use of DNA or fingerprints. Research on other methods of investigation is rare.

Those other methods include proactive methods of investigation such as wiretapping, surveillance, and undercover policing. The deployment of proactive policing strategies was stimulated by the rise of organized crime groups during the 1960s and 1970s (Fijnaut and Marx, 1995a: 15-16; see section 3.2). In many countries, the use of proactive methods of investigation has been the subject of heated debate (see section 3.3). Furthermore, it has served as an important driving force behind the growing attention for police governance and accountability (Walsh and Conway, 2011: 61). The need to control police activity, as expressed in academic and legislative debates, is especially strong where controversial methods such as undercover policing are concerned.

Although there certainly are scientific publications on the subject, little empirical research has been done on undercover policing (Smith et al., 2009; Brodeur, 1992: 108; Giacomantonio, 2011: 453). Loftus and Goold assume that this lack of empirical knowledge is probably due in part to the police desire to protect this covert and deceptive method of investigation (Loftus and Goold, 2011: 276-277, 286). Because of this criminological gap very little is known about the results that undercover operations yield for criminal investigations. Also, there is little knowledge of the outcomes regulatory procedures produce in the investigative practice. As a consequence, debates on police powers lack empirical evidence.

In the Netherlands, infiltration is the legally most serious undercover power (in section 3.3, we will elaborate on the legislation). Infiltration is only permitted in investigations targeting the most serious crimes and only if other investigative methods have proven (or are expected to be) ineffective. Infiltration is mainly used against organized crime. Besides conditions regarding proportionality and subsidiarity, an investigation team has to comply with strict authorization procedures; infiltration requires the approval of the highest level of authorization within the Public Prosecution Service.

Among the most popular subjects are criminal careers, effectiveness of correctional treatment, and causes of delinquency.

According to Ross, there is a ‘plethora of critical perspectives’ (Ross, 2008: 240). An important part of the literature looks upon the subject from a judicial and/or normative, critical point of view. Many studies focus on the issue of entrapment in buy-bust and sting operations. Basically, entrapment concerns the question whether an undercover operation actually tackles real criminals or whether such an operation incites individuals to commit a crime who did not have any criminal intent to begin with (e.g. Allen et al., 1999; Ashworth, 2002; Colquitt, 2004; Dillof, 2004).

A number of American studies provide information on the results of specific types of sting operations (cf. Roberts, 2000: 272). Some examples: Bowers and McCullough (1982) and Langworthy (1989) evaluated police anti-fencing operations; Webster et al. (2006) studied stings that targeted the spread of firearms from the legal arms trade into the underworld; and Mitchell et al. (2005) studied operations in which undercover agents posed as minors in online chat sessions, in order to trace potential sex offenders (see also Fulda, 2002). Yet, very little is known about the practice and results of undercover operations as an investigative instrument in general.
In this chapter, unique data are used to provide empirical insight into the numbers, course and results of infiltration operations as well as into the practical implementation of the regulatory requirements.

The following research questions will be addressed: How often are infiltration operations deployed? What results have these operations produced? And what outcomes do the regulatory requirements produce in the investigative practice? To answer these research questions we use data on all infiltration operations in the Netherlands during a six-year period, 2000-2005.

In section 3.2, we will elaborate on undercover policing as a method of criminal investigation. In section 3.3, we will examine the legislative debate regarding undercover policing. In section 3.4, we will elaborate on empirical data and methodology. Section 3.5 provides empirical insight into the deployment of this policing method: the numbers, course and results of infiltration operations in the Netherlands in the 2000-2005 period. In section 3.6 we will look more in depth into the investigative practice of infiltration operations. That section provides an analysis of the unpredictable course of infiltration operations, as well as an analysis of the possible outcomes that regulatory procedures may produce. In section 3.7, we will summarize the findings and discuss some implications.

### 3.2 Undercover policing

Proactive methods of investigation such as wiretapping, surveillance, the use of informers and undercover policing, share their covert nature as a common feature. Subjects are unaware of their deployment, as opposed to methods such as arrests, house searches and interrogations, which cannot be used without subjects knowing it. However, in contrast with wiretapping and surveillance, undercover police operations (as well as the use of informers) are not only covert but also deceptive. An undercover agent, for example, poses as a ‘friend’ or ‘fellow criminal’, tries to gain the trust of the suspect and uses his cover to gather evidence or other information. Another distinctive characteristic of undercover agents is that, in some cases, they participate in the very crimes that are under investigation (Ross, 2008: 239). Such is often the case in infiltration operations, when for example an undercover agent joins a criminal organization involved in drug trafficking. These specific features bring with them certain investigative opportunities as well as certain risks. They are also the reason why undercover policing is controversial.

In this section, we will elaborate on undercover policing as a method of criminal investigation deployed against organized crime (3.2.1). However, the use of undercover methods is much older and has served much more purposes than the fight against organized crime (Paoli and Fijnaut, 2004a; also see Von Lampe, 2001). The second part of this section will therefore provide a brief historical perspective on undercover methods (3.2.2).
3.2.1 Policing organized crime

'Modern policing no longer relies solely on detection, confession and the hope that witnesses will come forward. Increasingly, law enforcement agencies in the United Kingdom and in other countries are turning to pro-active, intelligence-led methods such as the use of surveillance devices, informants and undercover officers’ (Noorlander, 1998: 49; see also Martellozzo, 2012: 113).

Proactive investigative methods have become increasingly important. This shift is caused by the rise of organized crime and growing concerns about terrorism (Harfield, 2008: 64; Roberts, 2007: 99; Maguire and John, 1996: 316-318; Fyfe and Sheptycki, 2006: 319-320; Paoli and Fijnaut, 2004b: 1043). The nature of organized crime in the Netherlands has been described as transit crime; criminal groups are primarily involved in international illegal trade. The major business of organized crime groups in the Netherlands comes down to international smuggling activities. The Netherlands can be either a country of destination, a transit country, or, in the case of synthetic drugs and cannabis, a production country (Kleemans, 2004, 2007).68 Parties involved in these types of organized crime (often) participate with mutual consent. The wholesale drug trafficker, the airport employee who offers drug traffickers a ‘safe passage’ through airport security, the lower level drug dealer and his customers, and the financial specialist who provides money laundering services, they all act out of free will and - except for the customers - are driven by financial profit69. Therefore, organized crime, unlike traditional crimes such as burglary or rape, for that matter, does not generate victim reports.70 As a consequence, reactive policing, which is primarily instigated by victim reports and criminal events and behaviour in the past, becomes inadequate and is increasingly replaced by proactive policing, which focuses on gathering evidence about the current and future behaviour of offenders. Instruments that are used as proactive methods of investigation are, among others: wiretapping, surveillance, the use of informers, and undercover policing.71

Some proactive policing methods can be deployed without the police, or other people on behalf of the police (informers), actively interacting with criminals. When the police keep a suspect under observation and tap his telephone calls, they, in a sense, deploy

68 Synthetic drugs and cannabis that are produced in the Netherlands are not only used for international trade. The drugs are also distributed on the Dutch market.
69 Of course there are cases in which people are forced to cooperate. The point here is that, due to the opportunity to earn ‘quick money’, there are many willing perpetrators.
70 Some types of organized crime, such as the production of synthetic drugs, do produce ‘crime scenes’. Others, such as drug trafficking, do not.
71 Wiretapping, surveillance, informers and undercover policing can also be deployed in reactive criminal investigations. Undercover operations, for example, have been used in investigations regarding, among other crimes, murder and missing people (see section 3.2.2).
Infiltrating organized crime groups

passive methods of investigation. They follow the suspect and listen in to his conversations. However, some crimes may be hard to perceive by using these methods. Offenders in organized crime generally try to conceal their activities. They may, for example, change means of transportation when travelling from one location to another or use concealed language.\(^2\) In those cases the police might want to use a more active approach, i.e. informers or undercover agents who interact with the targets.

In many cases informers are actively involved in crime. Some consider these so-called participating informers as the best informers (Billingsley et al., 2001a: 6). Being criminals themselves, they produce the most valuable information. Using informers, however, has certain important drawbacks as well. Precisely because informers often are themselves criminals, they have their own agendas. As a consequence, they are less reliable. Also, it can be conceived as irresponsible to expose civilians to the risks involved in (befriending and) betraying criminals. Furthermore, the use of civilians might be limited by law, as is the case in the Netherlands.

Reliability is much less an issue when one uses specialized police officers: undercover agents. Also, since undercover agents are trained professionals, the risks involved may be more controllable (Billingsley, 2001: 81-97; Greer, 2001: 125; Billingsley, 2008: xv-xvii). When using undercover agents, one of the main disadvantages relates to the fact that the undercover agent lacks a criminal identity. An undercover agent (or the police undercover unit) has to create a cover story and find a way to make contact with his target(s).

When developing a strategy for an infiltration operation, the police benefit from the fact that organized crime is dependent on social relations.

\textit{Undercover policing and the social embeddedness of organized crime}

The social network approach on organized crime stresses the fact that criminal entrepreneurs thrive and are dependent on social capital. Social relations dissolve problems of co-operation in an unfriendly environment. Offenders operate in a hostile and uncertain habitat. Due to the illegality of their activities, there are no formal rules and arrangements to revert to, such as those regarding contracts, there is no mediating, judging authority to turn to in case of disagreement, and an offender cannot insure himself against unexpected setbacks. Furthermore, criminal entrepreneurs run risks because of police activity: assets can be seized and people can be arrested at any moment. And, last but not least, the colleagues of a criminal entrepreneur constitute an important risk factor. Those ‘colleagues’ are not bound by any regulation and there is no public quality assessment regarding criminal entrepreneurs. They may steel from him, betray him or may prove to be incompetent (cf. Reuter, 1983: 113-117; Kleemans, 2014b). These problems of distrust are mitigated through

\(^2\) Under those circumstances surveillance or wiretapping may still generate relevant information (although perhaps not evidence).
Chapter 3

the ‘social embeddedness’ of transactions, i.e. transactions take place within networks of personal relations (Kleemans, 2014b; Kleemans and Van de Bunt, 1999). In many cases of organized crime it turns out that family, friends and acquaintances work together and introduce each other to third parties.

Not only do social relations dissolve problems of co-operation in an unfriendly environment, they may also offer new opportunities through the use of each other’s resources. By making use of his social network, an offender may enhance his financial or logistic power, he may be introduced to new potential partners, and/or he may gain access to new markets. The most valuable relations are those that enable an offender to bridge ‘structural holes’, i.e. to form a connection between (parts of) networks that are poorly connected as a consequence of geographical, social and/or ethnic barriers between different countries, groups, and between the underworld and the licit world (Burt, 1992; Kleemans, 2007).

The social network approach is of value here because it clarifies what an undercover agent must do when targeting offenders involved in organized crime. An undercover agent must penetrate the offenders’ social network. He must somehow make contact with the target or his entourage and make his target believe that he is a capable and reliable partner. An offender, when looking for possibilities to enlarge his operational scope, might consider the undercover agent an asset to his network, provided the agent uses the right cover.

If an undercover agent succeeds in infiltrating an organized crime group, his participation in the group may prove very useful for the criminal investigation and trial. When an undercover agent, for instance, buys several kilos of cocaine from a suspect, this generally serves as very convincing evidence, i.e. evidence that is much more unequivocal than, for example, a monitored telephone conversation during which suspects constantly talk about drinking ‘coffee with milk’. However, realizing a successful undercover buy may prove to be quite a task, since, as will be clear when discussing the results of infiltration operations (sections 3.5.3 and 3.6.1), participation in criminal markets carries its own problems.

3.2.2 Undercover policing in historical perspective: from Judas to ‘Mr. Big’

Undercover methods are certainly not new. Spies and informers have been used for centuries to gather information on adversaries or to sabotage their actions. Such methods were deployed, for instance, by the Romans (Gibbon, 1831). A well-known example of undercover tactics can be found in the Bible; Judas, as one of Jesus’ disciples, was turned into an informer and the information he passed on to the authorities led to the arrest of his master.

It was not until the emergence of more or less modern police organizations, however, that the systematic use of undercover policing became possible (Marx, 1988: 17). A modern police organization was first created in Paris at the end of the seventeenth century. Initially, undercover methods were deployed in particular to protect political and economic interests,
but later they were used in operations targeting regular crime as well. Twenty *inspecteurs de police* of the notorious *bureau de sûreté* formed a well-developed undercover unit. During undercover operations the *inspecteurs* gathered information on citizens in both political and criminal matters.

In the eighteenth-century United Kingdom, undercover operations were executed by citizens as well as by police officers. In the *thief-taker* system, citizens - *thief takers*, many of whom were themselves criminals - recovered stolen property for a reward. Undercover tactics were also used by officers of what is often called London’s first modern police force, the *Bow Street Runners* (Fijnaut and Marx, 1995a: 2-16; Goddard, 1957). An early example of an undercover operation used by the police in the Netherlands dates back to 1846, when a police officer of the city of The Hague infiltrated a group of counterfeiters (Blaauw, in Frielink, 1990: 9).

The use of undercover operations in criminal investigations, as opposed to the deployment of undercover methods for state security reasons, increased from the 1960s onwards as a result of a rise of organized crime groups. As the fight against drug trafficking became more prominent, the police in the United States used undercover agents on a large scale, mainly in the form of so-called buy-bust operations. During a buy-bust operation, the police create the opportunity for someone to commit a crime, such as when an undercover agent poses as someone who wants to buy drugs. When the American Drugs Enforcement Administration (DEA) exported President Nixon’s *war on drugs* to Western Europe, the use of undercover methods by the police increased in Europe as well (Ross, 2008: 241; Fijnaut and Marx, 1995a: 15-16).

However, undercover policing is not limited to drug investigations, nor is it exclusively used in organized crime investigations. Undercover operations are directed against a broad range of crimes, such as drug trafficking, arms trafficking, evasion of excises, property crimes, murder and other violent crimes, and sex crimes. In the United States, so-called sting operations have been deployed for over forty years. A well-known type of sting operation is the use of false storefronts, directed at property crimes. Undercover agents may pose, for instance, as pawnbrokers who are willing to buy stolen property (Newman, 2007: 1, 7; Marx, 1988: 108-128). In the Netherlands, undercover operations are also deployed against property crimes, e.g. undercover agents purchasing goods from online suppliers of stolen property (Kruisbergen and De Jong, 2010: 144). Cyberspace offers a lot of possibilities, for criminals as well as for the police. Undercover agents, for instance,

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73 This does not mean that the use of undercover methods for state security purposes was abolished. In the United States, the FBI used undercover operations during the 1920s and 1930s in the fight against espionage and sabotage committed by communist and fascist groups (Fijnaut and Marx, 1995a: 10-14). In the same period, and for the same reason, the political use of undercover policing increased in Europe as well (Marx, 1988: 22-32). After World War II, undercover methods initially became discredited in Europe because Nazi Germany and the communist USSR had made large-scale use of these methods in suppressing their own population. However, the heat of the Cold War again induced deployment of undercover tactics for state security purposes.
may pose as juveniles in order to catch online sex offenders, as is done, for instance, in the United States and the United Kingdom (Mitchell et al., 2005: 251-256; Martellozzo, 2012). Moreover, in the Netherlands as well as in other countries, undercover operations are deployed in investigations into murder and other violent crimes. In these ‘befriending’ operations, an undercover investigator tries to build up such a relationship with a suspect that the latter confides his guilt to his ‘friend’ (Kruisbergen and De Jong, 2010: 143-144; Maguire and John, 1996: 316-318; Choo and Mellors, 1995; Smith et al., 2009: 169-170).

A specific application of befriending is the so-called ‘Mr. Big’ technique, which is used by the Canadian police in murder investigations, among others. Usually undercover agents posing as members of a criminal organization befriend the suspect and suggest that he may join their gang. Then the undercover agents involve the suspect in minor crimes, perhaps even pay him for his activities, and display evidence of wealth. Once the suspect is committed to the organization, he is offered a higher level job. But first the suspect is to be subjected to a job interview with the organization’s leader, ‘Mr. Big’. Furthermore, before becoming a full-fledged member, the suspect must confess to a crime he is said to have committed, i.e. the crime that is under investigation, usually murder. The suspect is told that his candour is required as a form of ‘insurance’ - so they have something on him if he ever betrays them. Another reason might be that ‘Mr. Big’, once he knows the truth, can pull some strings to make the evidence against the suspect disappear (Smith et al., 2009: 169-170). According to estimations, the technique has been used hundreds of times across Canada (Puddister and Riddell, 2012: 386). Variations of ‘Mr. Big’ have also been used by the Australian police as well as the Dutch police (Stuesser, 2008).74

Thus, undercover operations are deployed in criminal investigations targeting a broad range of crimes. This also applies to the Netherlands, where, as mentioned earlier, undercover operations are used against drug trafficking and illegal arms trade, but also in murder and property crime investigations, among others. Infiltration, however, the most serious kind of undercover police power in the Dutch code of criminal procedure, is mainly used against organized crime.

### 3.3 Regulation of undercover policing

The last three decades have shown a growth in the instruments used to enhance the control of police activities. Policing is increasingly subjected to formal statutory regulation, both in common law jurisdictions such as England and Wales, and in civil (continental) law jurisdictions such as Belgium and the Netherlands (Kruisbergen, Kleemans et al., 2012; Roberts, 2007: 97-102; De Roy and Van Dromme, 2004; Traest and Meese, 2000).

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74 A variation of the ‘Mr. Big’ technique has been used, for example, in a very recent Dutch murder case, the Heidy Goedhart case.
Furthermore, in some countries, including the Netherlands, authority over criminal investigations has been centralized (Van de Bunt, 2004: 711-712; Terpstra, 2011; Terpstra and Van der Vijver, 2005; Jongeneel-Van Amerongen, 1997: 62-63). Outright scandals, incidents and specific criminal cases are important impetuses behind ‘the flood of rules on investigative powers’, as some put it (Groenhuijsen and Kooijmans, 2011: 62).

3.3.1 Affairs and legislative debate

In the United Kingdom, the case of Khan played a significant role in the regulation of police powers. In the Khan case, the police attached monitoring equipment to the outside wall of a house. The House of Lords criticized the fact that such an invasive investigative method was deployed in the absence of any legislation. The Khan case was one of the catalysts behind the Police Act 1997.

In Belgium, undercover policing became discredited as a result of the François scandal, that took place in the 1970s. Léon François, a Rijkswacht (federal police) captain, was the head of a special police unit that deployed undercover operations against drug trafficking. During an undercover buy, François lost roughly €41,000. To cover up his failure, François wrote a false report regarding this action. Furthermore, to close the gap in his budget that resulted from the failed undercover buy, he withheld cocaine during following operations. When he had ‘saved’ two kilos of cocaine, he arranged to sell the drugs to a Dutch drug trafficker. The ‘drug trafficker’, however, turned out to be a member of a Dutch undercover unit. François and some fellow policemen were arrested and tried (Fijnaut, 1983: 93; Van Oss, 1994: 1-2). In the 1980s, possibly as a result of the François scandal, as Frielink (1990: 115) assumes, conditions regarding undercover operations were laid down in Belgian case law. Today, investigative methods, including undercover policing, are regulated by the Act on Special Investigative Police Methods (BOM Act), that came into force in 2003 (De Roy and Van Dromme, 2004).

The course of the Dutch legislative debate was defined by the IRT affair. The Interregional Investigation Squads (IRTs) were established in the fight against organized crime.

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75 In the Netherlands, the organizational structure of the police force has been subjected to change and political debate since the early nineteenth century (Croes, 2005). Effective as from 2013, the Dutch have one national police force.


77 Three other crises in Belgium had a major impact on public opinion and the political debate regarding the police. These were the Heysel Stadium Disaster (1985, rioting before a soccer match and poor crowd control resulted in 39 dead); the events involving the Nijvel Gang (Bende van Nijvel; 1983-1987, an extremely violent gang that raided supermarkets, killing 29 customers); and the Dutroux case (1995-1996, Marc Dutroux kidnapped, abused and killed several children). These affairs, however, did not involve the deployment of specific methods of investigation, as opposed to the François incident, which centred on undercover policing. Rather, they centred on a lack of police competence. All three affairs resulted in a parliamentary inquiry committee and these inquiry committees all reached the conclusion that the police had failed in handling the crisis. Several organizational police reforms were introduced in the aftermath of the crises (Enhus and Ponsaers, 2005: 345-346).
crime in the early 1990s. The IRTs deployed ‘experimental’ methods of investigation. After the sudden dismantling of the Amsterdam-Utrecht IRT in 1993 and internal disputes within the police, a Parliamentary Inquiry Committee on Criminal Investigation Methods (in Dutch: Parlementaire Enquêtecommissie Opsporingsmethoden (PEO)) was set up. The committee concluded that some of the new investigative methods were unacceptable (PEO, 1996, Eindrapport). Several tons of drugs had been imported under the supervision of the authorities, in the hope that so-called ‘growth informers’ would rise to what was alleged to be the top of criminal organizations. The informers, themselves criminals, were assisted by the police and the customs to pose as trustworthy and successful criminal entrepreneurs. The committee, however, questioned whether the police were running the informers or vice versa. Furthermore, the committee concluded that there was a legal vacuum regarding methods of investigative methods such as undercover policing and surveillance. In the Netherlands, until 2000, the code of criminal procedure lacked specific sections that covered such intrusive techniques. Another major conclusion of the committee was that the command and control of criminal investigations should be improved. The committee’s report provided the foundation for the new Act on Special Investigative Police Powers (in Dutch: Wet bijzondere opsoringsbevoegdheden (BOB Act)), effective as from 2000. The BOB Act regulates several investigative powers, strengthens the authority of the Public Prosecution Service in criminal investigations, and requires accountability at trial for the deployment of investigative powers (Kleemans, 2007: 164-165).78

In the following section, we will look into the BOB Act and additional authorization procedures concerning undercover operations in the Netherlands.

3.3.2 Regulation in the Netherlands
Since the BOB Act came into effect, participation in criminal activities by police officers or by civilians working under supervision of the police, has to comply with laws and regulations, and in some cases it is forbidden. The Act requires that illegal goods or substances that constitute a risk to public health or public safety, such as drugs or weapons, be confiscated (Beijer et al., 2004: 278). Therefore, it is, in principle, not allowed to ‘supervise’ the importation of drugs, as the IRT did.

78 In other countries, incidents and affairs played a key role in the legislative debate as well. In the United States, the so-called ABSCAM (Abdul Scam) led to a controversy. ABSCAM was an undercover operation run by the FBI, which ran in the late 1970s. It was a typical ‘fishing expedition’ or ‘honey pot operation’, i.e. it was not directed at specific suspects but rather targeted a category of persons. It involved undercover agents who tried to bribe members of Congress. The operation resulted in several convictions but it was criticized as well. In the aftermath of ABSCAM, Congress considered the introduction of an Undercover Act, but the bill was never put to the vote. However, the Department of Justice did issue The Attorney General Guidelines for FBI Undercover Operations (Gershman, 1982: 1585-1586).
In infiltrating organized crime groups, the Dutch legislator opted for a three-fold division of powers in the BOB Act (Kruisbergen, Kleemans et al., 2012: 401-402). The code of criminal procedure distinguishes between systematic intelligence gathering, the purchase of illegal goods or substances or the rendering of illegal services (undercover buys), and infiltration. An infiltration operation may - and often does - involve one or several undercover buys.

The deployment of infiltration is assumed to involve more risks than the deployment of an undercover buy, which in turn is assumed to be more risky than the deployment of systematic intelligence gathering. The underlying idea is that during infiltration, the undercover agent actually becomes a member of a criminal organization. Not only is joining a criminal organization a crime but, as the legislator summarizes the risks, it also entails the risk of moral contamination of the police officer by the criminal environment, as well as risks concerning the physical safety of the undercover agent and his relatives. When an undercover buy is used, an undercover agent also participates in a crime. However, that participation is less far-reaching and less sustained than is the case with infiltration. Systematic intelligence gathering is assumed the least risky because the undercover agent ‘only’ collects information and does not participate in any crimes.\(^79\)

The legal requirements for the deployment of the undercover powers differ in accordance with the assumed level of risk attached to them. Infiltration is only allowed in investigations targeting the most severe crimes (proportionality) and only if other investigative methods have proven (or are expected to be) ineffective (subsidiarity). The other two undercover powers (undercover buys and systematic intelligence gathering), however, may be deployed against a (much) broader category of crimes and without an exhaustive exploration of alternative methods of investigation.

Civilians may be used in undercover operations to gather information, to deploy an undercover buy or to deploy an infiltration operation. The use of civilians for undercover buys and infiltration operations, however, is permitted only if police officers are not capable of deploying the operation. In the case of infiltration, the use of criminal civilians was initially forbidden.\(^80\) Later on, in the aftermath of 9/11, the ban on criminal civilian infiltrators was slightly loosened when the Dutch Minister of Justice deemed the use of criminal civilians permissible in terrorism investigations (Tweede Kamer, 2002-2003, 27 834, no. 28). In 2013, the ban was loosened still a bit further. In ‘very exceptional cases’

\(^79\) In practice, however, systematic intelligence gathering may be more invasive than infiltration, for both undercover agent and suspect. This is due to the fact that in some cases of systematic intelligence gathering, an undercover agent has to build (and betray) a very close, personal relationship with the suspect, whereas during infiltration, as the undercover agent often poses as a criminal entrepreneur, the relationship may be limited to a more ‘professional’ level (Kruisbergen, Kleemans et al., 2012: 405).

\(^80\) The BOB Act itself did not specifically forbid the use of criminal civilians in infiltration operations, but such a prohibition could be inferred from the legislative debate (Beijer et al, 2004: 277-278).
of organized crime, and only if police officers and non-criminal civilians cannot be used, criminal civilians may be used in an infiltration operation (Tweedde Kamer, 2012-2013, 29911, no. 83: 4).

To ensure accountability, the BOB Act requires that a report is made of the methods of investigation used and that their deployment is accounted for at trial (Beijer et al, 2004: 277-278).

In addition to the legal conditions provided by the BOB Act, a public prosecutor has to comply with internal rules and procedures within the Public Prosecution Service.\(^{81}\) Larger, more long-term criminal investigations targeting organized crime can only be started after a more or less centralized decision-making process, in which the targets of an investigation have been compared with general investigative priorities.

Once an investigation has started, a public prosecutor certainly is not completely autonomous. When he intends to deploy an undercover operation, he generally has to discuss this with a specialized investigative prosecutor and subsequently with the regional chief public prosecutor.\(^{82}\) In case of infiltration, the legally most far-reaching undercover power, a public prosecutor has to comply with further authorization requirements. In those cases, a prosecutor, after deliberation with the regional chief public prosecutor, has to submit a substantiated proposal to the Central Assessment Committee (in Dutch: Centrale Toetsingscommissie (CTC)). The CTC tests the proposed operation for proportionality and subsidiarity, among other factors. If the CTC considers the operation permissible, it puts the proposal to the Board of Procurators General, the highest level of authorization within the Public Prosecution Service. The board of Procurators General ultimately decides whether the infiltration operation is allowed or not. After the Board has given its approval, continuation of the infiltration operation requires the prosecutor to deliver feedback and to submit a plan for continuation on a three months’ basis.

### 3.4 Current study

In the Netherlands, police agencies are relatively open to social science researchers. The Research and Documentation Centre (in Dutch: Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC)) plays an important role in research on organized crime and criminal investigation. Because the WODC is part of the Ministry of Security and Justice, researchers of this institute have access to confidential data sources, such as police files (Van de Bunt, 2004: 678-679; De Poot, 2010; Marx, 1995: 329). Yet, in the Netherlands, too, empirical knowledge regarding undercover policing is scarce. One empirical study has

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\(^{81}\) Under Dutch law, the authority over a criminal investigation lies with a public prosecutor.

\(^{82}\) At least when the research was conducted.
been done on undercover policing in the Netherlands. However, Kruissink et al. (1999) conducted their research in the late 1990s, before the introduction of the BOB act.\(^{83}\)

The data we use in this chapter cover all 23 Dutch criminal cases during the 2000-2005 period in which a proposal for an infiltration operation was submitted to the CTC.\(^{84}\) The data derive from a research project that was conducted by the WODC (Kruisbergen and De Jong, 2010).

For all of these 23 criminal investigations, we analysed the files of the CTC. When analysing these files, we made use of a checklist and collected information on (among other things) the grounds on which the public prosecutor wanted to deploy an infiltration operation and the decision of the CTC and the Board of Procurators General regarding the requested approval. Subsequently, for 19 cases we analysed the actual police files at the public prosecutor’s offices. For three cases, none of which went to trial, these files could not be traced. With regard to one case the public prosecutor requested the exclusion of the police file.\(^{85}\) The police files include sources of information such as testimonies of undercover agents and reports of wiretaps, police observations and interrogations of offenders and witnesses. The files were analysed by means of a checklist that mainly focused on the strategy and tactics of the infiltration operation, the course and results of the operation, and the course and results of other investigative methods.

In addition, we conducted face-to-face interviews with 35 people, of which 20 were involved in the cases we studied. The other 15 respondents were selected on grounds of their direct or indirect involvement in other cases in which undercover operations were used. The respondents consisted of the (former) heads of the special police undercover units (8), detectives of the National Crime Squad (6), detectives of regional crime squads (5), public prosecutors (11), staff members of the CTC (2), a procurator general (1), and other specialist members of the police (1) and Public Prosecution Service (1). The interviews covered a range of topics (among other things): the kind of criminal cases and circumstances that are (not) feasible for deployment of an undercover operation; the planning, preparation and strategy of undercover operations; contacts between the undercover agent and the target; results of undercover operations; risks related to undercover operations; and the implementation of regulatory procedures.

\(^{83}\) Kruissink et al. gathered information on proposed undercover operations that were submitted for permission in 1996. Before the introduction of the BOB Act, the Dutch code of criminal procedure lacked specific sections that covered undercover policing. Kruissink et al. labelled every undercover operation in his research as ‘infiltration’, whereas undercover operations are divided into three different types since the BOB Act came into effect (see section 3.3).

\(^{84}\) During the 2000-2005 period, authorization for an infiltration operation was requested in 24 Dutch criminal investigations. However, as in one case the infiltration operation was still ongoing at the time the research was conducted, that specific case was not included. Furthermore, the research only considers Dutch criminal investigations. Infiltration operations within the context of international legal assistance (for which approval was requested in seven cases during the 2000-2005 period) were not included.

\(^{85}\) Information on this case was gathered by conducting an interview with detectives who were involved in the investigation, and by analysing the CTC file.
3.5 Infiltration operations in the Netherlands

In section 3.5.1, we will elaborate on the assessment of proposed infiltration operations by the CTC and the Board of Procurators General. Section 3.5.2 provides information about the grounds on which public prosecutors opt for an infiltration operation and the types of criminal offences that are targeted by these (proposed) operations. In section 3.5.3, we will look into the course and results of infiltration operations.

3.5.1 The assessment of proposed infiltration operations by the Central Assessment Committee (CTC) and the Board of Procurators General

During the 2000-2005 period, approval to deploy an infiltration operation was requested in 23 Dutch criminal investigations. In those cases, the public prosecutor submitted a substantiated proposal to the CTC. The CTC considered 16 of those 23 proposed operations permissible and subsequently brought those 16 proposals before the Board of Prosecutors General. In all those 16 cases, the Board followed the advice of the CTC and approved the deployment of infiltration.

In seven cases, the CTC assessed the use of an infiltration operation not admissible. For three of those cases (cases A1, B53 and B54) the reason for this negative decision lies in the fact that, according to the CTC, the undercover operation as described in the proposal should not be labelled as infiltration but rather as systematic intelligence gathering and/or (an) undercover buy(s). The fourth proposal (case B50) that was declined involved an operation targeting the sexual exploitation of minors. The operational goal of the infiltration operation came down to establishing contact with the subject and getting him to offer the sexual services of a minor. Although actual sexual activities were not to take place, the plan was judged to be ethically and politically unacceptable. A fifth and sixth proposal (cases B56 and B58) were declined because the CTC was of the opinion that, considering the course the criminal investigation was taking, it was too early to deploy an infiltration operation. In the seventh case (case B57), infiltration was not allowed since the CTC concluded that the case lacked sufficient suspicion of organized crime being committed or planned.
3.5.2 In which cases and on what grounds does a public prosecutor opt for an infiltration operation?

Of the 23 cases in which the public prosecutor proposed an infiltration operation, 17 involved drug trafficking investigations, four of which also targeted another *criminal offence*, such as illegal arms trade. The six remaining cases concerned investigations targeting terrorism (one), violence (one), illegal arms trade (one), child pornography (one), sexual abuse/exploitation (one) and human smuggling (one).

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*86 Year in which a proposal for an infiltration operation is submitted before the Central Assessment Committee (CTC). During the period 2000-2005 authorization for an infiltration operation was requested in 24 Dutch criminal investigations. However, as in one case the infiltration operation was still ongoing at the time the research was conducted, that specific case was not included.*
For 18 cases, the *reason* why the public prosecutor wanted to deploy an infiltration operation lay in the fact that other methods of investigation had proven (seventeen cases) or were assumed (one case) to be ineffective. This inadequacy of other policing methods particularly related to the high level of concealment maintained by the suspects; they frequently change cars, for instance, mainly have criminal meetings in person instead of ‘doing business’ by phone, and use concealed language. For five cases, it was impossible to point out one specific reason, for example because a combination of reasons was involved or the reason was unknown.

### 3.5.3 Course and results of infiltration operations

To determine the results, or success, of an infiltration operation, we assessed the contribution an operation has made to the investigation and/or trial. A first and most direct contribution is made when an infiltration operation generates *evidence* that is used to get a suspect convicted. Second, some operations may not generate evidence but do produce information that contributes in a more indirect manner. This may be *steering information*, i.e. information that played a part (in a minor of major way) in the course of the investigation, such as intelligence on the composition or activities of a criminal organization or information regarding the means of communication the criminals used. It may also be *rest information*, i.e. information, concerning suspects or criminal activities, that was not used in the investigation on behalf of which it was collected, but that was passed on to and used by another investigation team.

**Results**

Figure 1 summarizes the deployment and results of infiltration operations in the Netherlands during the 2000-2005 period. The course and results of infiltration operations will be exemplified with cases below.

In two of the sixteen cases in which an infiltration operation was approved, the operation was abandoned even before the start. In both cases the direct goals of the criminal investigation, the arrest and trial of the main suspects, were achieved by other policing methods prior to the start of the infiltration (see section 3.6.2).

Thus, during the 2000-2005 period, fourteen infiltration operations have actually been carried out in the Netherlands. *In six cases the infiltration operation generated evidence*, (partly) on the basis of which suspects were convicted. Five of these six operations not only contributed to the trial but also contributed, by producing steering information, to the investigation. For the other case this is unknown.

One of these six criminal investigations (B59), for example, focused on the production and trafficking of XTC. In this operation undercover agents had tens of contacts with the suspects, whether in person or by telephone. Meetings in person took place in catering establishments, among other places. The undercover agents and suspects engaged in leisure
activities but only on a limited scale, since conversations soon turned to criminal activities. A first undercover buy was executed successfully. A second attempted ‘deal’ failed. A third undercover buy again succeeded when the suspects sold several hundreds of thousands of XTC pills, although this only amounted to slightly more than half the quantity that had been agreed upon. The two successfully completed undercover buys served as evidence, on the (partial) basis of which the main suspects, as well as other offenders, were convicted. Moreover, the infiltration operation yielded insight into the criminal activities of the main suspects.

In two other cases, the focus of criminal investigation shifted from the illegal arms trade to drug trafficking. In one of these cases (B43), the infiltration operation did produce some information regarding the illegal arms trade, but the storage location remained unknown and an attempt to buy weapons (undercover buy) failed. The undercover agents did succeed, however, in demonstrating the suspect’s involvement in drug trafficking. Two undercover buys resulted in several kilos of heroin. An undercover buy involving a much larger quantity did not take place because the undercover agent and the suspect could not reach an agreed price. The earlier undercover buys as well as the undercover agents’ statements served as evidence in the criminal trial against the main suspects.

Furthermore, in yet another case (B52), the criminal investigation targeted a group of people suspected of trafficking in precursor chemicals. Several undercover buys were executed in this operation. Yet, some of the samples of precursor chemicals bought by the undercover agent turned out to contain a fake substance. An intended undercover buy in which tens of litres of PMK (a precursor for the manufacture of XTC) would be acquired, eventually never took place because the suspects were unable to deliver. Nevertheless, the operation generated evidence. That evidence consisted of the undercover buys that did take place and statements made by undercover agents regarding their interaction with the suspects. Besides evidence, the operation also produced valuable steering information. As a result of the infiltration operation, an intermediary dealing in precursor chemicals was identified. Moreover, when the suspects and the undercover agent(s) had a meeting, the frequency of the telephone calls among the suspects increased as soon as the meeting was over. The taps on these telephone calls produced useful information (as well as evidence), but they also put the police on the track of a store for other illegal goods.

**Four operations did not generate evidence but ‘only’ produced steering and/or rest information.** Although these four operations did contribute to the investigation, their level of success, generally speaking, was lower than that of the six operations that yielded evidence. That is, for all infiltration operations that have been carried out, gathering evidence was one or the main objective - an objective that was not met in these four operations.
One of these cases (B51) concerns a criminal investigation into an illegal arms trade. At first, the infiltration operation went very well. Earlier than expected, the undercover agent established a good contact with the main suspect. Despite these contacts, the main suspect was unable or unwilling to deliver weapons, as a result of which an intended undercover buy did not take place. Because of a lack of evidence, the investigation ended without any arrests, let alone convictions. Yet, the infiltration operation did produce information regarding (among other things): the specific criminal activities of an emerging ethnic group; and other criminal offences in which the main suspect appeared to be involved, which in part led to a new criminal investigation (rest information).

A criminal investigation into large-scale XTC trafficking provides another example (B42). In this investigation, the police deployed two separate infiltration operations. One of these targeted the main suspect, a very experienced and suspicious criminal. The second operation targeted one of the main suspect’s fellow criminals. In the latter, an undercover agent got rather close with his target and became part of his social life, whereas the undercover agent who targeted the main suspect only established contact on a superficial level. The investigation’s strategy included buying drugs from the main suspect. However, the intended undercover buys never took place, although negotiations were in an advanced state. Before those negotiations succeeded, several suspects were arrested, the main suspect among them. The arrests were a direct result of other methods of investigation (see section 3.6.2). These methods produced sufficient evidence to support the conviction of the main suspect as well as other suspects. The main suspect was convicted of trafficking many hundreds of thousands of XTC pills and leading a criminal organization, among other offences. The two infiltration operations did not produce any evidence. They did generate some information regarding the criminal organization, but it seems that this did not play a significant role in this or any other investigation.

Finally, four operations did not contribute to the investigation or trial at all. One of these cases was the only case in which the undercover agents entirely failed to penetrate their targets’ social network; they could not make contact (B40). The criminal investigation ended without any arrests.

Another case concerned an investigation into terrorism in which the police found out that the suspect was trying to obtain weapons (B39). That information gave rise to a plan for a rather extraordinary infiltration operation; an undercover agent was to deliver weapons to the main suspect - who was to be arrested immediately after the delivery.\footnote{The Dutch code of criminal procedure does not provide for an undercover sell.} The undercover agent and the suspect planned to meet each other to discuss conditions regarding the delivery. However, the suspect, who perhaps grew suspicious, did not show up. In spite of this lack of success of the infiltration operation - which did not contribute to the investigation or to the trial - several suspects were arrested and subsequently convicted.
A third example clearly shows that even operations during which undercover buys are ‘successfully’ executed, may not contribute to the trial or criminal investigation (B48). The investigation targeted drug trafficking and focused on a main suspect who was supposed to be a key player ‘behind the scenes’. This man proved very hard to make contact with. He had a very limited social life and only participated in criminal activity with people whom he knew well. Furthermore, according to a police report, he was fully aware of the fact that he might be under police surveillance. During the undercover operation, which ran for a very long time, undercover agents did establish good contact with people in the main suspect’s entourage, but they met the man himself only once. The undercover agents even succeeded in buying tens of thousands of XTC pills. However, the drug deals could not be linked to the (supposed) ‘key player’ or other main suspects. These undercover buys as well as the infiltration operation and the criminal investigation as a whole, were closed without any arrests being made. Thus, the infiltration operation did not contribute to the trial, and since it did not produce any significant information, it did not contribute to the investigation either.

One of the reasons why some infiltration operations did not produce any results (four cases) or did not generate evidence (four cases), is the unpredictability of the interaction between the undercover agent(s) and the suspect(s), especially when it comes to undercover buys.

3.6 Analysis: unpredictability and regulation of undercover operations

In this section we will look more in depth into the investigative practice of infiltration operations in the Netherlands. Section 3.6.1 explores a characterizing feature that emerges from the empirical data on infiltration operations: the unpredictability of the meetings between the undercover agent and the suspect. The fundamental unpredictability of criminal investigations targeting organized crime has consequences for the practical implementation of (some) regulatory procedures. The implementation of regulatory procedures is the subject of section 3.6.2.

3.6.1 Unpredictability, the consequence of participating in illegal markets

An undercover agent, as mentioned in section 3.2.1, has to penetrate an offender’s social network. In infiltration operations deployed against criminals who are trafficking in illegal goods, this often means that an undercover agent poses as a criminal entrepreneur, a drug dealer for instance, who is interested in doing business. The purpose of such an operation is to display (suggest) enough capability and trustworthiness to allow the suspect to think that it is profitable and safe to make his ‘fellow criminal’ an offer to buy drugs. However, since the undercover agent poses as a criminal entrepreneur, he is confronted with the unpredictable behaviour common to illegal markets.
In chapter 2, we described the unpredictable course of undercover operations, especially those focusing on bringing about one or more undercover buys. That chapter focused on all undercover operations in the Netherlands executed in one year, 2004. In that specific year all undercover operations consisted of the undercover powers of systematic intelligence gathering and/or undercover buys. Infiltration was not used in 2004. The course of (intended) undercover buys that are part of infiltration operations proves to be even more erratic than the 2004 cases. In the 2000-2005 period, infiltration was used in fourteen criminal investigations. In one of these operations, the undercover agent did not establish contact with the target. Of the remaining thirteen operations, twelve focused on bringing about one or more undercover buys, among other things. Of these twelve operations, none worked out as planned.

Some undercover buys do not take place at all. One reason may be that an undercover agent, although he did make contact with the initial subject, failed to establish sufficient contact with the key player within a criminal organization. Case B47 provides an example. In this case, undercover agents made contact with several members of a criminal organization (allegedly) involved in cocaine trafficking and money laundering. On several occasions an undercover agent travelled abroad to meet the ‘big man’. Yet, although they met several family members of the ‘big man’, in the end the key player himself never showed up. That is presumably the reason why the undercover agents never effectuated an actual drug deal (undercover buy), even though suspects promised they could deliver hundreds of kilos and discussed details and prices. The reason why the ‘big man’ never showed up is unknown. Perhaps, in the end, the undercover agents were not deemed capable and/or trustworthy enough. The reason, however, might also have little to do with the undercover agents’ performance. As is clear from other examples, it is not easy to ‘do business’ with criminals efficiently; often commitments are not kept and/or expectations are not met.

Another reason why undercover buys do not take place may be that the suspect(s) is (are) unable to deliver. One example concerns an investigation into the illegal arms trade (B43). An undercover agent established contact with the suspects, who were found willing to do business. However, since their supplier in Eastern Europe had been arrested, they could not keep their promise to deliver a large quantity of weapons. During a conversation, one of the suspects offered several automatic weapons to be delivered that same evening. When later on the suspect could not be reached by the undercover agent, the suspect explained this on a later occasion by saying he was ‘hot’ (under police surveillance). Case B51 also concerned the illegal arms trade. In this case, undercover agents managed to establish a good contact with the main suspect relatively quickly. However, the main suspect turned out to be incapable of or unwilling to sell weapons, which was a possible consequence of (perceived) intensified security measures in the aftermath of 9/11.

In some cases, a suspect turns out to be unable to deliver simply because he lacks the required resources or capability to live up to his promises. Still another reason is
cautiousness on behalf of a suspect to do business with people he has met only recently. In these cases the suspect’s unwillingness may also be caused by the fact that the undercover agent does not play his role convincingly enough. Finally, the undercover agent himself may cancel an undercover buy. In case B41, for example, an undercover agent cancelled a deal on tens of thousands of XTC pills because he had reason to believe that the delivery would probably originate from offenders outside their scope of interest.

Other undercover buys do take place but do not work out as planned. In some cases the goods that are bought from a suspect may not be what the undercover agent thought they would be, like in case B52, where samples of ‘precursor chemicals’ proved to contain a fake substance. Case B46 concerned a criminal investigation into child pornography. An undercover agent managed to buy several CD-ROMs from a suspect. Although the CD-ROMs did contain pictures, they did not contain child pornography.

Cases B43 (see section 3.5.3) and B49 provide examples of investigations that initially focused on the illegal arms trade but, after an attempt to buy weapons failed, switched to drug trafficking when drug deliveries did prove to be possible. Sometimes an undercover buy does not live up to initial expectations in another sense, like when, for instance, tens of thousands of XTC pills were bought, but the deliveries could not be linked to the main suspects (B48).

In several cases, an undercover buy took place, but only after earlier intended undercover buys failed. Furthermore, in some cases the quantity of delivered goods turned out to be (much) smaller than agreed, like in case B59 (see section 3.5.3).

The fact that an undercover operation does not work out as planned, does not automatically mean that the operation does not contribute to the investigation and/or trial. However, in general, unexpected developments such as described above do cause undercover operations to last longer or remain without the intended results.

3.6.2 Implementation of regulatory procedures in the investigative practice

Since the BOB Act came into effect, (most) methods of criminal investigation are covered by specific sections in the code of criminal procedure. Besides filling the legal vacuum, the BOB Act certainly has improved transparency of the use of methods of investigation. The BOB Act requires that a report is made of the methods of investigation used. Furthermore, when the police use a special investigative police power, its deployment, in principle, will be accounted for at trial (Beijer et al, 2004: 277-278). Before the introduction of the BOB Act, judges often were not even informed about the simple fact that an undercover operation had been deployed (Van Traa, 1997: 16). An evaluation of the BOB Act showed that Dutch judges have gained more insight into the deployment of special methods of criminal investigation (Beijer et al., 2004: 282). The importance of transparency and accountability in court, and the fact that judges seem satisfied with the reporting of and
insight given into the use of investigative methods, also shows when examining court
decisions regarding undercover operations (see chapter 2).

However, as the following subsections will show, regulatory requirements not always
entirely work out as planned.

**Testing for subsidiarity**

How meetings between an undercover agent and a suspect will work out is very unpredictable,
as was shown in section 3.6.1. However, it is not the undercover operation alone that ‘suffers’
from this unpredictability. Because of the relative large number of suspects in an average
organized crime investigation, the erratic behaviour of these suspects, and the fact that different
policing methods are usually deployed simultaneously, investigating a phenomenon such
as organized crime is unpredictable in itself. Because of this fundamental unpredictability,
authorization procedures may not always fit the investigative practice. For one thing, it makes
it harder to test prospectively for subsidiarity.

In most cases, the reason why a public prosecutor wants to deploy infiltration lies in the
fact that other methods of investigation have proven to be ineffective (section 3.5.2). When
testing a proposed infiltration operation for subsidiarity, the CTC and the Board of Prosecutors
General have to judge whether it is likely that the goals of the criminal investigation can
be achieved by deploying other policing methods. This test has a retrospective, as well as
a prospective, element. The retrospective judgement encompasses the policing methods
that already have been used in a criminal investigation. The prospective judgement means
assessing the probability that other methods than infiltration will produce any decisive results
in the weeks and months to come.

In several cases in which the Board of Prosecutors General authorized an infiltration
operation, it turned out that other methods of investigation did in fact generate decisive results,
although they were deemed ineffective.

Two of these cases concerned investigations into the production/trafficking of synthetic
drugs. According to the proposal for infiltration, in case B45 other methods of investigation did
generate sufficient information regarding the production of XTC, but they failed to produce
results in determining who was responsible for exporting the drugs. In order to fill this gap,
the public prosecutor proposed infiltration, and the proposal was subsequently authorized
by the Board of Prosecutors General. Yet, before the infiltration unit started its operation,
wiretapping, among other methods, did reveal which players were involved in exporting the
XTC. Ultimately, several suspects were convicted, the main suspects included, mainly on
the grounds of information generated by wiretapping, bugging (face-to-face conversations)
and statements. Case B55 showed a similar course of events. In this case, the investigation
team was unable to gather evidence regarding the production of XTC and could not locate
the XTC lab. Yet, only a few days after the infiltration operation was approved, the two main
suspects, i.e. the owner of the XTC lab and the chemical technician, were arrested. Both
were convicted. Here also, the evidence was collected by means of wiretapping, bugging and statements, among other methods.

In three other cases, the infiltration operation was executed, but the convictions that followed in these cases were achieved without any major contribution from the undercover operation. One of these cases concerned an investigation targeting cannabis trafficking (B44). Although several special investigative methods were used, the investigation team failed to gather concrete evidence against the main suspects. The public prosecutor therefore proposed an infiltration operation. The plan was approved. Several undercover agents were deployed in this operation and they managed to make contact with the main suspect as well as with people in his entourage. Part of the operation’s strategy was to perform an undercover buy. Yet, an undercover buy never took place, since other methods of investigation produced sufficient evidence to arrest and subsequently convict several suspects. These other methods of investigation were, among others: wiretapping, observation (visual surveillance), bugging, and a house search.  

Case B42 concerned the aforementioned criminal investigation into large-scale XTC trafficking (section 3.5.3). Here also, infiltration was proposed because other policing methods did not generate decisive results. Furthermore, as the proposal mentioned, the investigation targeted a highly experienced criminal who acted very cautiously and was fully aware of possible police attention. He used concealed language when talking on the phone, used different pre-paid cell phones, adjusted his driving behaviour to render surveillance more difficult, and travelled under a false name. As the results of wiretapping clearly showed, however, other suspects were certainly not as disciplined as the main suspect was. Some of those other suspects, for instance, relatively openly discussed with each other their frustrations about the main suspect’s behaviour towards them. The infiltration operations did not generate any evidence, nor did they produce any information that played a significant role in this or any other investigation. Sufficient evidence to arrest and subsequently convict several suspects, the main suspect included, was produced by other methods of investigation. Those other methods were bugging, wiretapping, statements made by suspects and witnesses, observations, covertly entering the suspect’s premises (in Dutch: ‘inkijkoperatie’), and using a surveillance beacon.

When testing prospectively for subsidiarity, the CTC and the Board of Prosecutors General have to assess the likely development of a criminal investigation. The aforementioned cases show that this procedure presupposes a level of predictability that contradicts the complex and unpredictable nature of investigations into organized crime.

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88 The infiltration operation did in fact produce relevant information. Thanks to the operation, a formerly unknown member of the criminal collaboration came into the picture. For tactical reasons, however, this information was not used in this case and was passed on as rest information. It actually led to police activity targeting this specific suspect, but the results of these activities are unknown.

89 Finally, an investigation into terrorism led to the arrest and conviction of the main suspect without any contribution being made by the infiltration operation that was deployed (case B39, see section 3.5.3).
Unintended effects of authorization procedures: ‘interference aversion’

If a public prosecutor wants to deploy an infiltration operation, he has to comply with several authorization requirements (as described earlier in section 3.3.2). Ultimately, he has to get approval of the highest level of authorization within the Public Prosecution Service, the Board of Prosecutors General. When a proposed infiltration operation is approved, a public prosecutor has to obtain renewed approval of the Board of Prosecutors General on a regular basis.

In the investigative practice, this centralized decision-making process may produce unintended effects. Some public prosecutors may fear that they will lose control if they choose to use infiltration, and therefore might avoid this investigative method. A head of an undercover police unit phrases it as follows:

‘That is disadvantageous to opting for an infiltration operation in an early stage. You will have to deal with the interference of the Board of Prosecutors General.’

As two members of the Central Assessment Committee (CTC) mention:

‘We notice that public prosecutors want to avoid having to put a substantiated proposal before the CTC. They don’t appreciate the interference. As soon as a public prosecutor has to deal with the CTC, his operation is forced into a ‘straitjacket’ of periodic review’.

This fear of losing control, or ‘interference aversion’, may constitute one of the reasons why undercover operations, especially infiltration, are so scarcely used in the Netherlands; during the 2000-2005 period, infiltration was proposed in 23 Dutch criminal investigations, 16 of which were approved, and 14 of which were actually executed.90

Earlier research among public prosecutors (and police officials) has shown that, besides avoidance of undercover operations, interference aversion may produce another outcome as well (Beijer et al., 2004: 109). When deploying an undercover operation, different undercover powers, such as systematic intelligence gathering and undercover buys, may be combined in one operation. For a public prosecutor, it might not always be clear which (combination of) undercover power(s), i.e. which legal label, is applicable to an intended undercover operation. Yet, the difference with regard to authorization requirements is very clear; infiltration requires the highest level of authorization, whereas systematic intelligence gathering and undercover buys do not. Therefore, in cases in which public prosecutors doubt whether an intended undercover operation should be labelled as

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90 In the years 2006, 2007 and 2008, according to the Annual Report 2008 of the CTC, infiltration was proposed in one, two and one cases, respectively (CTC, 2009: 13). These numbers may include proposals within the context of international legal assistance.
infiltration or as a combination of systematic intelligence gathering and undercover buys, some may be inclined to choose the latter.

3.7 Discussion

In this chapter, we have provided empirical insight into the deployment and results of infiltration operations in the Netherlands. Moreover, we have looked into some outcomes of regulatory procedures with regard to infiltration operations. We will summarize the most important findings and discuss some implications.

First, in the 2000-2005 period, the Board of Prosecutors General authorized the use of deployment in sixteen cases, fourteen of which were actually deployed. In six cases the infiltration operation contributed to the trial, i.e. it produced evidence on the (partial) basis of which suspects were convicted. Four operations ‘only’ produced steering and/or rest information, while four operations did not contribute to the investigation or trial at all.

Second, the research showed that the course of infiltration operations is very unpredictable. This unpredictability especially holds for operations that include (intended) undercover buys. In those operations, an undercover agent often poses as a fellow criminal who may want to do ‘business’. Thus, he participates in a criminal market and is therefore confronted with the unreliability and unpredictability that is so typical of criminal markets. Of the thirteen infiltration operations in which the undercover agent(s) established contact, twelve operations involved one or more (intended) undercover buys. None of these twelve operations worked out as planned.

Third, the empirical results provided insight into the implementation of regulatory procedures in the investigative practice. A criminal investigation, especially when it focuses on organized crime and perhaps even more so when it involves undercover operations, is a very complex, ‘unruly’ process (cf. Neyroud and Disley, 2007: 553). The potential invasiveness of policing methods justifies attempts to rationalize and control this process. Criminal investigations are, in fact, increasingly subjected to laws and procedures. As we saw in section 3.6.2, the introduction of the BOB Act certainly improved transparency, and therefore the accountability, of the use of investigative instruments in criminal cases. However, laws and authorization procedures may not always completely work out as planned. The intention to restrict the use of invasive policing methods (or methods that are regarded as such) to cases that really require their deployment, is rational and legitimate. Yet, testing prospectively for subsidiarity clashes to a certain extent with the fundamental unpredictability that characterizes investigations into organized crime. Likewise, centralized authorization procedures intend to assure a well-considered use of potentially risky methods of investigation. Yet, they may also produce ‘interference aversion’ and thereby result in unwanted outcomes.

As we saw, criminal investigation is a relatively neglected field of research for criminologists (Grabosky, 2010: 364; see also De Poot, 2010: 102). In part, this may be
the consequence of the choices made by criminologists. It is also caused, however, by the
reluctance of authorities to open up to social scientists or to provide information on police
activities, such as the number, let alone the types and results, of undercover operations.
Especially in Europe, there is very little empirical knowledge on undercover policing. Therefore, even the ‘leading police scholars in Europe (...) are generally forced to rely on
the occasional government report of a scandal, court records, historical and mass media
accounts, and their experience as citizens’ (Marx, 1995: 329).

Because of the sensitive nature of policing, let alone policing methods that are deployed
against organized crime, the investigative process can never be fully transparent (Walsh and
Conway, 2011: 71). It is very well feasible, however, to conduct research on investigative
methods without jeopardizing any specific criminal investigation or disclosing operational
tactics. It is not only feasible, but it might also be very useful and even necessary. As
Bean - when referring to informers and witness protection schemes - puts it: no strategy
should remain so secretive as to remain without critical evaluation (Bean, 2001:161; Fyfe
and Sheptycki, 2006: 350-351). Besides filling the existing scientific, criminological gap,
empirical research on methods of criminal investigation may serve three goals.

First, a greater knowledge base may help the Public Prosecution Service to exercise
the authority in criminal investigations.

Second, a greater transparency of investigative practice may serve the legislative
debate. Methods of investigation that are used against organized crime were and still are
the subject of, sometimes heated, debate. Debates regarding the invasiveness, necessity
and risks of methods of investigation, can be improved when information is available on
the number and kind of cases in which these methods are deployed and on the results they
produce.

Third, empirical insight into the practical outcomes of formal, regulatory requirements
may serve to improve regulatory quality (cf. Ayling, 2013: 15).