

#30: The end does (not) justify the means

A well-known and truthful saying is that 'power corrupts'. Even though the public prosecution fights this phenomenon, the same can happen to a public prosecutor. The public prosecution service has a lot of power against civilians. As soon as a suspicion of a criminal act arises, the law provides a wide range of possibilities to investigate. Everyone would agree that misuse of these powers is unacceptable. This unfortunately does not mean that the prosecution service always uses these powers with prudence. A recent case in the Netherlands shows that the prosecution services went far beyond what is acceptable in order to 'help' the tax department to receive information. The [Court of Appeal declared](#) the prosecution service inadmissible because of this misuse of powers.

[Lawlunch #05](#) naturally comes to mind when reading this decision of the Court of Appeal. In this Lawlunch we concluded that the prosecution service is hardly ever being punished for procedural errors during the criminal investigation. The idea is that the suspect may not have any advantage of such errors. If a procedural omission occurs during an investigation the judge can decide to i) reduce the sentence, ii) exclude evidence or iii) conclude that the prosecution is inadmissible. The last one is however very exceptional. However a judge can also suffice with the single notification of the omission that has been made as explained in [Lawlunch #02](#). The Court of Appeal in this case however found enough reason in the breach of principles of good governance to declare the prosecution inadmissible.

In this case the tax authorities requested a trust office to receive their full e-mail correspondence. As this

correspondence contains a lot of confidential information with clients the trust office finds this request disproportionate. In order to have a judge in a tax procedure decide whether there is an obligation to provide the information, the e-mail correspondence is secured in a sealed envelop and kept at the trust office. An information notice was filed to the trust office, after which the trust office started a procedure against this in order to ask a judge whether there is any obligation to provide these e-mails.

The judge in the tax procedure however never got the chance to decide whether there was an obligation for the trust office to provide the requested information. Since the prosecution service started a case against the director of the trust office for not providing information to the tax authorities, based on article 68, section 1, under a and b, and article 69 of the General Law on Government taxes

In the tax procedure however it was unclear whether the trust office had an obligation under the law to provide the requested information to the tax authorities. This tax procedure was started against a request of the tax authorities to receive the full e-mail correspondence of the trust office.

It turns out that the tax inspector who was dealing with the objections against the information notice informed the tax police – the FIOD – that the trust office refused to provide the requested information. While the objections against the information notice were in place, the prosecutor started an investigation based on intentionally not providing the requested e-mails to the tax authorities. The tax police then raided the trust office and seized the sealed envelope. The tax authorities then requested the prosecutor to share the information from the envelop with them. Which the prosecutor did.

The regional criminal court initially convicted the director. The reason is that the objections against the information

notice were withdrawn, therefore it became definite. The Court of Appeal however concluded that the objections against the information notice have a suspensive effect. The court also decided that the criminal procedure was only created with the goal to seize the sealed envelope and its information, while there was still a procedure ongoing in which would be decided whether there was any obligation for the trust office. The Court adds that the envelope with the e-mails also was not of any importance to the criminal investigation, as it was clear which documents were not provided.

The prosecution services made themselves an extension of the tax department by using their powers for this purpose, the court qualifies this as *detournement de pouvoir*; misuse of powers. The Court declares the prosecution inadmissible. We could not agree more. The courts have to make clear to the authorities that the end does not justify the means.

Do you have any questions about this subject, are you struggling with a related issue or would you like to discuss this with us? Please feel free to contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl.