

## **SUPERVISORY COMMITTEE**

ON

THE INTELLIGENCE AND SECURITY SERVICES

CTIVD no. 5A

## **SUPERVISORY REPORT**

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### **On the Supervisory Committee's investigation into the legitimacy of the investigation by the MIVD into the proliferation of weapons of mass destruction and their means of delivery**

#### **1. The MIVD's tasks concerning the proliferation of weapons of mass destruction**

One of the areas of attention of the MIVD is the identification and mapping of the acquisition of nuclear, biological and chemical weapons programmes by high-risk countries and terrorist groups. In its annual report 2004 the MIVD stated that it had stepped up its activities in the area of proliferation. Reason for this is that parts of NATO territory have meanwhile become within reach of the means of delivery for weapons of mass destruction and Dutch armed forces have been deployed in regions where countries have weapons of mass destruction. Besides, the MIVD indicates that future developments in the area of weapons of mass destruction may have consequences for the security of NATO, the European Union and therefore the Netherlands.<sup>1</sup>

The MIVD therefore has an important task in performing an investigation into the activities of the high-risk countries in the area of the development and acquisition of weapons of mass destruction and their means of delivery. The following countries are referred to by the MIVD as high-risk countries: Iran, Syria, North Korea and Pakistan. The MIVD also conducts investigations into the Russian Federation and the People's Republic of China as prolific (disseminating) countries.<sup>2</sup>

The activities which the MIVD performs in the context of its investigation into the proliferation take place on the basis of the MIVD's A-task, as referred to in art. 7 paragraph 2

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<sup>1</sup> MIVD Annual Report 2004, p. 63.

<sup>2</sup> MIVD Annual Report 2004, p. 63-65.

sub a of the Act on the Intelligence and Security Service 2002 (hereinafter referred to as the WIV 2002). This task includes:

‘conducting an investigation into:

1°. the potential and the armed forces of other powers, for a proper structure and effective use of the armed forces;

2°. the factors that influence or may influence the maintenance and promotion of the international legal order in so far as the armed forces are involved or expected to be involved.’

In addition the subject of the proliferation of weapons of mass destruction and their means of delivery is mentioned in the Designation Order, which sees to the investigation concerning other countries, of the Prime Minister, Minister of General Affairs, under art. 7, paragraph 2 sub e of the WIV 2002.<sup>3</sup> This Designation Order also applies to the AIVD (see art. 6, paragraph 2 sub d of the WIV 2002). The Explanatory Memorandum to this Designation Order explains that this Designation leaves unimpaired the activities carried out by the MIVD on the basis of art. 7, paragraph 2 sub a, b, c and d of the WIV 2002.

## **2. The Committee’s investigation**

The Supervisory Committee on the Intelligence and Security Services (hereinafter referred to as: the Committee) has conducted an investigation into all the activities carried out by the MIVD from 29 May 2002 (the effective date of the WIV 2002) within the context of the investigation into the proliferation of weapons of mass destruction and their means of delivery. The Committee has mapped out all the powers used and has assessed these against the statutory requirements, including the Act on the Intelligence and Security Services 2002 Defence Mandate Regulation and the Security Screening Act<sup>4</sup> and the sub mandate regulations falling under these. Also assessed was whether or not the investigative activities performed met the requirements of necessity (article 18 of the WIV 2002), proportionality and subsidiarity (article 31 and 32 of the WIV 2002). In addition to an examination of the files the

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<sup>3</sup> See art. 1 sub b of the ‘Designation of subjects Act on the Intelligence and Security Services’, Government Gazette 23 December 2004, no. 248, p. 10.

<sup>4</sup> Government Gazette 5 August 2002, no. 147, p. 6. See also the amendments to these mandate regulations: Government Gazette 2 May 2003, no. 84, p. 11 and Government Gazette 16 August 2004, no. 155, p. 7.

Committee also conducted talks with several of the service's employees responsible for the investigation, and the coordinator of the intelligence and security services (art. 4 of the WIV 2002).

### **3. Cooperation and alignment of tasks between MIVD and AIVD**

The Committee has established that in aligning the tasks between the two services a number of problems have occurred which in the Committee's opinion may partly be considered a consequence of the Designation Order in the meaning of art. 6, paragraph 2 sub d and art. 7 paragraph 2 sub e of the WIV 2002.<sup>5</sup> This Designation Order states the subjects which the services are to investigate in the context of their foreign task. One of these subjects is the 'developments in countries that are relevant within the context of the proliferation of weapons of mass destruction and their means of delivery.' The explanatory memorandum to this Designation Order notes that the further elaboration as regards aspects, countries and regions has for reasons of national security been laid down in a classified appendix to the order.

Both services have been assigned a leading role with regard to specific countries. The explanatory memorandum to the Designation Order states that this order leaves unimpaired the activities that the two services perform based on their other tasks.

The alignment problems referred to have resulted in one of the objectives of the Designation Order, as phrased in the explanatory memorandum, having been insufficiently met:

'Providing one instruction to the two services with regard to the subjects referred to in this context intends to ensure a careful alignment and cooperation between the two services and to the immediate sharing of relevant information.'

It follows from the WIV 2002 (art. 58) that the two services have a statutory obligation to as much as possible cooperate with one another. This in order to realise that 'the services perform their actions as efficiently and effectively as possible.'<sup>6</sup>

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<sup>5</sup> 'Designation of subjects Intelligence and Security Services Act', Government Gazette 23 December 2004, no. 248, p. 10.

<sup>6</sup> Parliamentary Documents II 1997/98, 25 877, no. 3, p. 72.

The Committee has established that the division into countries has (partly) resulted in a number of problems with regard to the alignment of tasks between the two services. The Committee recommends investigating the possibilities of another division, i.e. to seek more alignment with the two services' different tasks.

However, a certain degree of overlap of tasks cannot, even if the division is as clear as possible – be avoided. In the Committee's opinion a task is in particular reserved here for the heads of the two services, who are responsible for the cooperation. The Committee considers this important in particular with an investigation such as the present one, in view of the clear tasks the two services have in this area of investigation and in view of the fact that overlap is to be expected.

The Committee also emphasises here the role that the coordinator of the intelligence and security services (art. 4 WIV 2002) could fill here. This coordinator's task includes coordinating the execution of the tasks of the services with the other Ministers on the instruction of the Prime Minister. The legislator says about this:

'It is evident, that (...) the two services benefit from the actions of the services being aligned to one another where required. In so far as this is insufficiently done in practice, article 4, third paragraph, under b of the legislative proposal in our view gives us an adequate provision; for the coordinator's task is to coordinate the execution of the tasks by the services.'<sup>7</sup>

Art. 5 of the WIV 2002 provides that the heads of the services are to render their assistance to the coordinator in relation to the execution of his tasks. The Committee notes here that the coordinator can only carry out his statutory task if he has sufficient information at his disposal. According to art. 5 of the WIV 2002, this supplying of information has been entrusted to the heads of the services.

The Committee recommends the close involvement of the coordinator of the intelligence and security services (art. 4 WIV 2002) in the alignment of tasks and actions of the two services in the area of the investigation into the proliferation of weapons of mass destruction.

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<sup>7</sup> Parliamentary Documents II 1997/98, 25 877, no. 3, p. 24.

The Committee has established that the cooperation between the AIVD and the MIVD has been properly effected by the heads of the two services. The importance of cooperation is therefore subscribed by both. Of course, on some points there is room for improvement. In the present case the problem however occurred on the work floor of the services. The Committee points to the fact that the heads of the services are also responsible for communicating the agreements made within the organisation.

Apart from the question which modus should be chosen for a proper alignment of tasks, there is also the question whether or not it is recommendable to set up a single task force team consisting of both employees of the AIVD and employees of the MIVD who engage in the investigation into the proliferation of weapons of mass destruction. The overlap of tasks and the problems (signalled) that arise from this overlap could this way be avoided, thus meeting the starting point laid down in art 58, paragraph 1 of the WIV 2002. Also in the Committee's view this could lead to a more effective investigation into the proliferation of weapons of mass destruction.

The Committee recommends conducting an investigation into the practical advantages and disadvantages of a single operations team.

#### **4. Exercising (special) powers**

In an investigation into the proliferation of weapons of mass destruction and their means of delivery the MIVD, in addition to the power to request information from informants under art. 17 WIV of the 2002, the special power of art. 21 was deployed. This concerns the deployment of natural persons who under responsibility and instruction of the MIVD are charged with the collection of specific information about persons and organisations who for the service's fulfilment of tasks may be relevant. Besides the deployment of sources the MIVD makes use of art. 27 of the WIV 2002; the monitoring and recording of non-cable telecommunication and applying a more detailed selection to this communication. In the next sections we will enter into the Committee's findings regarding the deployment of these special powers by the MIVD.

##### **4.1 Findings regarding the deployment of art. 21 of the WIV 2002**

###### **4.1.1 *Distinction between agents and informants***

### *General framework*

In the deployment of human sources by the MIVD a distinction should be made between consulting informants and the deployment of agents. Art. 17 of the WIV 2002, which provides that the MIVD is entitled for the collection of information to refer to administrative bodies, civil servants en furthermore anyone considered able to provide the required information, contains the basis for consulting informants. An informant is understood to mean:

‘the natural person who due to his position or capacity has or can have at his disposal information that for a proper execution of the service’s tasks may be useful.’<sup>8</sup>

Art. 21 of the WIV 2002 provides for the deployment of agents, in the context of which an agent is understood to mean the ‘natural person who is deliberately deployed by a service to collect information that may be useful for the service’s performance of its tasks’.<sup>9</sup> These can be the service’s own staff or external persons who have been specifically approached for this task.

The basic difference between informant and agent is that an agent can be given directions (steered). The agent works on the instruction and supervision of a service. Agents are given an instruction by a service to retrieve specific information. There are no such directions with informants. Informants only provide information which in view of their position or capacity they already have or can retrieve. In practice however the difference between the two can be very small.

Steering an agent is laid down in a statutory instruction to the agent. The legislator has provided that the power to give instructions has deliberately been laid down in order ‘to actually effect the responsibility for the deployment of an agent.’<sup>10</sup> Pursuant to article 21, paragraph 6 of the WIV this instruction is to be laid down in writing.

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<sup>8</sup> Parliamentary Documents II 1997/98, 25 877, no. 3, p. 31.

<sup>9</sup> Parliamentary Documents II 1997/98, 25 877, no. 3, p. 31.

<sup>10</sup> Parliamentary Documents II 1997/98, 25 877, no. 3, p. 31.

'This is desirable not only from an internal management perspective (steering of operational activities), but also to be able to assess and evaluate the agent's actions afterwards.'<sup>11</sup>

#### *Using the distinction by the MIVD*

In most of the MIVD's operations where human sources are used within the context of the investigation into the proliferation of weapons of mass destruction, in the Committee's view the MIVD has sufficiently made a distinction between agents and informants. However, for the deployment of several sources this was different. These sources had the status of informant, whereas in the Committee's opinion they were given directions by the MIVD and therefore had to be considered as agents. For example, the service requested to enter into certain contacts or to extend or renew existing contacts. This concerns activities which the sources had apparently performed in response to a request by the MIVD. According to the Committee this can be seen as steering by the MIVD.

The Committee recognises that the distinction between agents and informants is sometimes difficult to make, since this is a sliding scale in which context it is not always easy to establish precisely where on the scale one finds oneself. The Committee would like to stress that in case of doubt regarding the status that a source is to be given, the procedure with the most safeguards is to be opted for, i.e. art 21. of the WIV 2002. Using this power the services will allow the service to more effectively formulate its responsibility towards its sources. However in this case a written instruction needs to be made (see art. 21 paragraph 6 of the WIV 2002), which allows for a better assessment and evaluation of a source's actions. The latter can also be guaranteed by prescribing that permission for the deployment of these powers is to be renewed after three months.

In one specific case of the deployment of a source by the MIVD it was acknowledged at some stage that the source was to be given the status of agent. The request for permission put to the Minister of Defence was however only submitted after the period during which the source had carried out the main activities at the MIVD's request. The eventual permission by the Minister of Defence only followed several weeks later.

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<sup>11</sup> Parliamentary Documents II 1997/98, 25 877, no. 3, p. 32.

The Committee considers it necessary that the MIVD properly monitors the status which a source to be deployed by the service is to receive and that the request for permission as well as the actual permission for the deployment of an agent are timely submitted and that permission is given by the Minister of Defence, in order to avoid the wrongful exercise of this special power.

Regarding the deployment of one source, the staff of the Humint department (AHM) of the MIVD noted that the MIVD's source – who at the time was considered to be an informant – was to be given the status of agent at some stage. In the Committee's opinion this was a correct observation, in view of the intended activities of this source and the degree in which this person would receive directions from the MIVD. However, this intention of the service did not materialise and the intended source remained an informant.

The Committee recommends that the MIVD puts in place an adequate (internal) supervision mechanism for the deployment of sources, which sees to the status that these sources are to be given.

#### *4.1.2 Duty of care under art. 15 of the WIV 2002 in using informants*

According to the Committee a number of incidents where sources were deployed involved a security risk. These sources were informants at the time of the security risk.

Unlike with the deployment of agents there is no need to request permission for the deployment of informants. However, in the Committee's opinion, in view of the duty of care of the Director of the MIVD for the security of sources under art. 15 sub c of the WIV 2002, the Director of the MIVD is to render account for the deployment of these informants. For this duty of care to be met, all relevant interests are to be weighed up. In the Committee's opinion this requires at any rate an obligation on the side of the MIVD to warn its sources against any dangers they may possibly run when carrying out activities for the MIVD.

The MIVD has met this duty of care by creating various reporting lines to the Director of the MIVD when deploying informants who run a security risk ensuing from their work for the MIVD. The Committee has established that the Minister of Defence also personally monitors the deployment of such informants.

The Committee is of the opinion that in so doing the MIVD meets its duty of care for the security of persons with whose cooperation information is collected (art. 15 sub c of the WIV 2002).

#### 4.1.3 *Cooperation of the MIVD with foreign fellow services*

Foreign sister services were involved in the deployment of a number of sources. Art. 59 of the WIV 2002 provides the statutory framework for this. Art. 59, paragraph 4 of the WIV 2002 provides that technical and other forms of support can be rendered to the intelligence and security services of other countries in connection with the interests to be protected by these bodies, in so far as:

- a. these interests are not inconsistent with the interests these services have to protect; and
- b. a proper fulfilment of the services' tasks is not inconsistent with the rendering of the form of support in hand.

The government noted the following about the 'interests which the service needs to protect':

'The criterion referred to under a (...) has necessarily been phrased in general terms, for it concerns a multitude of interests. Sometimes these interests have been translated into a specific government policy (that has been adopted), such as for example the human rights policy; however, sometimes this is not the case.'<sup>12</sup>

It can be inferred from this consideration that the service has to serve a great many interests, but that it is impossible to enumerate these interests comprehensively. Besides, the specific interpretation of the notion depends on the circumstances of the case.

One of the MIVD's sources at some stage received many directions from a foreign fellow service. In addition, several foreign agents (run by this foreign service) were deployed in this investigation, which were directly affiliated to the MIVD's source. These foreign agents, incidentally, did not perform any activities on Dutch territory. The Committee has established that the MIVD had little insight into the (foreign) activities of these agents.

The Committee has assessed the cooperation of the MIVD with the foreign fellow service in said case against the statutory requirements of art. 59 of the WIV 2002. In so doing the Committee established that there was a lack of supervision by the MIVD over the activities of the source – which were to a large extent directed by the foreign fellow service – and over the

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<sup>12</sup> *Parliamentary Documents II 1999/00*, 25 877, no. 8, p. 101.

activities by the foreign agents deployed in this operation. The activities of these agents could have consequences for the MIVD's source.

It follows from art. 15 sub c of the WIV 2002 that the (Director of the) MIVD is to ensure the security of the persons with whose cooperation information is collected. This duty of care in the Committee's opinion is to be regarded as one of the 'interests to be served by the service' in the meaning of art. 59, paragraph 4 of the WIV 2002. If the MIVD has insufficient supervision over the activities of the Dutch source, the MIVD fails to meet its responsibility for this source and consequently in the Committee's opinion the MIVD fails to meet the requirements ensuing from art. 59 of the WIV 2002. In case the activities of the foreign agents involve a relatively foreseeable security risk for the MIVD's source, in the Committee's opinion the MIVD is required – within its powers – to exercise supervision over these agents.

The Committee recommends that the MIVD fully accepts its responsibility towards a source and to this end supervises the activities of the MIVD's source and – within its powers – the activities of foreign agents within the relevant cooperative partnership in so far as these activities may yield a reasonably foreseeable security risk for the MIVD source.

#### *4.1.4 Termination of operations*

In first instance the MIVD did not indicate when an operation was to be considered as terminated: the service simply no longer renewed the deployment of an agent. Nowadays, a request for termination is sent to the Director of the MIVD who subsequently needs to approve the request. This procedure ensures that the Director of the MIVD has a complete overview of current and terminated operations.

The Committee assents to this method of termination. For this way the Director of the MIVD is better able to exercise his responsibility for agents deployed by the MIVD (compare duty of care pursuant to art. 15 of the WIV 2002).

The MIVD has thus put into effect the recommendation made by the Committee in a previous supervisory report.<sup>13</sup>

#### *4.1.5 Request for permission regarding a network of agents*

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<sup>13</sup> See Supervisory report of the Supervisory Committee into the legitimacy of a counter-terrorism operation of the MIVD; Parliamentary Documents II 2004/05, 29 924, no. 1.

In first instance the MIVD used a single request for permission for the deployment of a network of agents which, in view of the deployment, were largely similar. This request was of a rather broad nature.

In a later stage the MIVD split the request for permission, in the sense that an independent request for permission was submitted for each individual agent. According to the MIVD, this allows for providing more specific directions by the Humint Department (AHM) and it is possible to better inform the Director of the MIVD on the development per agent as regards access to information and area of deployment.

The Committee subscribes to this position of the MIVD. In the Committee's opinion, for the deployment of each individual agent a separate request for permission is in principle required. It is in particular important that an individual assessment regarding the principles of necessity (art. 18 of the WIV 2002), subsidiarity and proportionality (art. 31 and 32 WIV 2002) is made for each agent.

#### 4.2 Findings in respect of the applicability of art. 27 WIV 2002

##### 4.2.1 *Explanation to art. 27 WIV 2002*

Art. 27 WIV 2002 provides for the power of monitoring and recording using technical equipment of non-cable bound telecommunication and applying a further selection on these stored data. Monitoring and recording momentarily takes place by the MIVD's Signals Intelligence department (AVI) but will shortly be taken over by the newly to be formed National SIGINT (Signals Intelligence) Organisation (NSO) in which both the MIVD and the AIVD participate.<sup>14</sup> Applying a further selection on the data will continue to be entrusted with the two services.

The legislator indicates that this power involves the interception of 'air traffic in the broadest sense of the word' and in particular the interception of telecommunications traffic via satellites.<sup>15</sup>

The legislator has the following to explain about the character of the monitoring:

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<sup>14</sup> See for this the covenant concluded between the MIVD and the AIVD: Government Gazette 9 October 2003, no. 195, p. 11.

<sup>15</sup> Parliamentary Documents II 1997/98, 25 877, no. 3, p. 44.

‘This means that the interception should not focus on messages originating from a specific person or organisation or messages that are related to a technical feature, but that for example all the messages which are sent via a specific satellite channel or at a certain frequency, are ‘sucked’ as it were from the air and subsequently stored on computers.’<sup>16</sup>

Art. 27, paragraph 2 of the WIV 2002 provides that for exercising the power to monitor and record non-cable bound telecommunication, no permission from the Minister of Defence or on behalf of him the head of a service (art 19 of the WIV 2002) is required. The permission requirement is not prescribed here because the mere monitoring and recording of telecommunication does not constitute an infringement on personal privacy, since the contents of the recorded messages has not (yet) been taken cognisance of.

There can only be an infringement of personal privacy after a further selection of data based on:

- a. data concerning the identity of a person or organisation;
- b. a number as referred to in article 1.1, under t, of the Telecommunications Act, or any technical feature;
- c. catchwords related to a subject to be described in more detail.

In view of the infringement of personal privacy in applying the selection permission is required. For selection based on the categories a and b permission of the Minister of Defence is required (art. 27 paragraph 4 of the WIV 2002). This permission is required for a period of three months and can be renewed each time.

In the selection based on catchwords subjects can be used. Pursuant to art. 27, paragraph 5 of the WIV 2002 the Minister of Defence has to approve these subjects, after which the MIVD can make a selection on the basis of catchwords related to these subjects. The permission of the Minister of Defence is in this case valid for a period up to one year and can be renewed each time.

‘The request to give permission is to contain at any rate an accurate description of the subject and the reason for the selection. These conditions which the request is to meet, guarantee that the minister involved has the insight required for granting the

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<sup>16</sup> Parliamentary Documents II 1997/98, 25 877, no. 3, p. 44.

permission. The catchwords related to the subjects have no added value For this insight.<sup>17</sup>

Section 4.2.4 enters into the adopting of catchwords in more detail.

#### *4.2.2 Request for permission selection based on art. 27 paragraph 3 of the WIV 2002*

Since approximately February 2004 the MIVD has worked with just one request for permission with respect to the subject of proliferation. All sub-subjects (which may for example be aimed at specific high-risk countries) have been integrated into this request, as a result of which the request for permission has become more comprehensive. Pursuant to art. 27, paragraph 4 of the WIV 2002, the Minister of Defence's permission for a selection based on data regarding the identity of a person or organisation (art. 27, paragraph 3 sub a of the WIV 2002), or a number as referred to in article 1.1, sub t, of the Telecommunications Act, respectively, or any technical feature (art. 27, paragraph 3 sub b of the WIV 2002), granted for a period of three months, which permission can be renewed each time. In between (within the statutory period of three months) there are several complements to a current permission. At the next renewal reference will be made to the previous renewal as well as the interim complements.

This way (referring each time to older renewals and complements) we arrive at a situation in which there is an accumulation of targets based on which the service is entitled to select the data received in bulk. This however also includes persons or organisations which as will become apparent in a later stage, pose no threat to national security. With regard to these targets it is not (or no longer) proportional that the power pursuant to art. 27, paragraph 3 of the WIV 2002 is applied.

The MIVD has identified this problem in time: the Head of the Signals Intelligence department (AVI) is nowadays informed which persons or organisations are no longer seen as a target. In such a case the service is not (no longer) entitled to select the monitored and recorded telecommunication on the names of these persons or organisations. The MIVD says about this in an internal document:

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<sup>17</sup> Parliamentary Documents II 2000/01, 25 877, no. 14, p. 33.

‘For various reasons it is possible that criteria that previously were part of a mandate, are cancelled. For example, if no information has been selected or information not originating from the intended source and the expectation is that this will not happen in the future, either. It is also possible that communication from the intended source has been selected but that it does not contain any relevant information, or only insufficient information. Furthermore, it is possible that the investigation has been given a lower priority and from the perspective of proportionality selection is no longer necessary or the investigation may be terminated altogether.’

With this course of action the MIVD meets its obligation under art. 32 of the WIV 2002, which provides that exercising a special power is immediately terminated if the purpose for which the power was used, has been realised.

The Committee subscribes to this course of action by the MIVD.

#### *4.2.3 Terms with respect to art. 27 of the WIV 2002*

The Committee has established that in first instance the permission under art. 27, paragraph 4 of the WIV 2002 from the Minister of Defence for the selection as referred to in art. 27, paragraph 3 sub a and b of the WIV 2002, was in some instances granted whilst exceeding the term – often by a couple of weeks. The latter permissions were granted within the statutory period. The Committee has the impression that permission is now granted by the Minister of Defence in time.

The granting of permission, whether or not in time, has no retroactive effect, such as becomes clear already from the text of the Act, in which in art. 27, paragraph 5 sub b of the WIV 2002 reference is made to: ‘the reason why the selection *will be* applied.’ If permission for selection is granted too late, the MIVD must consequently stop the selection of the recorded telecommunication. The Committee has established that this creates a dilemma for the service, since the service will not be able to properly perform its statutory tasks. The Committee considers this fact an extra reason to grant permission(s) in time.

The Committee recommends granting the selection pursuant to art. 27, paragraph 4 of the WIV 2002 in time.

Except for the point mentioned above, the deployment of the selection pursuant to art. 27, paragraph 3 of the WIV 2002 met the statutory requirements, including the requirements of

necessity (art. 18 of the WIV 2002), subsidiarity and proportionality (art. 31 and 32 of the WIV 2002).

#### 4.2.4 *Mandating with regard to laying down catchwords*

Pursuant to the Act on the Intelligence and Security Services 2002 Defence Mandate Regulation<sup>18</sup> and its sub mandate regulations, the senior analysts of the Signals Intelligence department (AVI) are responsible for laying down catchwords under 27, paragraph 3 sub c of the WIV 2002. According to the considerations of the legislator when the legislative proposal for the WIV 2002 was discussed, initially a different starting point was opted for:

‘Laying down catchwords is specialist work that is performed by staff with experience on the subject. In practice therefore a proposal to use certain catchwords will be made by an analyst. The power to eventually adopt the catchwords (to approve them) prior to these being used as selection criterion, lies with the head of the service or on behalf of him an officer appointed by him.’<sup>19</sup>

With respect to laying down catchwords the MIVD has established that it is unfeasible for the service to have the catchwords approved by the Director of the MIVD of the Director of the Signals Intelligence department (AVI). For according to the MIVD the catchwords change quickly and new catchwords are being added all the time.

‘A further confrontation of the proposed scheme with the daily practice has shown that the collection of catchwords that are used in performing the selection (so-called word banks) are subject to frequent changes; sometimes catchwords are changed daily (added or removed). These are often very detailed changes, for example with regard to the names of chemical compounds.’<sup>20</sup>

The Committee has inspected the list of catchwords, as drawn up for the investigation into the proliferation of weapons of mass destruction. This concerns an extensive list of catchwords

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<sup>18</sup> Government Gazette 5 August 2002, no. 147, p. 6. See also the amendments to these mandate arrangements: Government Gazette 2 May 2003, no. 84, p. 11 and Government Gazette 16 August 2004, no. 155, p. 7.

<sup>19</sup> Parliamentary Documents II 2000/01, 25 877, no. 14, p. 34.

<sup>20</sup> Parliamentary Documents II 1999/00, 25 877, no. 9, p. 24-25.

which includes in particular a large number of technical phrases. The Committee subscribes to the MIVD's opinion that it is unfeasible to prescribe the permission by the Director of the MIVD or the Director of the Signals Intelligence department (AVI) for each of these catchwords.

The catchwords entered by the AVI's analysts are recorded per user. This concerns an internal control mechanism whereby the service can take random samples of the catchwords logged.

The Committee subscribes to the taking of random samples by the MIVD of the catchwords entered. For this ensures supervision over the exercising of the power to select on catchword and therefore this possibility is to be seen as a guarantee against the abuse of this power.<sup>21</sup>

Besides, the service thus meets its obligation to supervise control over exercising the mandate to the senior analysts.

'In the cases in which the power to grant permission by the minister (or where appropriate by the head of the service) has been mandated, in addition a special responsibility is entrusted upon the provider of the mandate to see to a proper exercise of the mandate.'<sup>22</sup>

The desirability of putting in place an internal control mechanism is in particular relevant because the selection of a catchword may lead to an intrusion of privacy. The Supervisory Committee also keeps supervision over the catchwords entered, as well as the functioning of the internal supervision mechanism.

This way, according to the Committee, justice is done to the following starting point of the legislator:

'Granting a mandate and sub mandate is to take place in such a way that this power to grant permission for the use of a special power is at a hierarchically sufficiently high level, whereas on the other hand a flexible and effective action of the service continues to be possible. It is clear that as the deployment of a special power has more severe consequences for personal privacy, the decision to this effect has to be taken at a higher level.'<sup>23</sup>

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<sup>21</sup> Compare art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case law of the European Court of Human Rights.

<sup>22</sup> Parliamentary Documents II 2000/01, 25 877, no. 14, p. 9.

<sup>23</sup> Parliamentary Documents II 2000/01, 25 877, no. 59, p. 8.

#### 4.2.5 *Term for destruction pursuant to art. 27, paragraph 9 of the WIV 2002*

Pursuant to art. 27, paragraph 9 of the WIV 2002 telecommunication that is not directly selected may for further selection be kept for a maximum period of one year. Investigation by the Supervisory Committee has shown that the MIVD does not meet this term for destruction of one year pursuant to art. 27, paragraph 9 of the WIV 2002, in the sense that telecommunication that was received and recorded more than one year ago, is still stored, but that no selection takes place on this telecommunication. Therefore at the moment communication recorded more than one year ago, is not taken cognisance of.

The government observed in respect of the term of destruction:

‘If the data originating from monitored and recorded telecommunication as referred to in article 26, first paragraph, of the legislative proposal (the present art. 27, paragraph 1 of the WIV 2002, Supervisory Committee) are already to be destroyed after the first selection, there would be no further selection (...) with the possibility of a further enhancement and supplementation of relevant information for current investigations. This we consider undesirable. Under certain conditions such a further selection, which indeed involves a certain period of retaining of the relevant data, should be possible.’<sup>24</sup>

The MIVD points to the fact that the situation should be avoided that possibly valuable intelligence that could be relevant for any (current) investigation, is destroyed.

A future legislative proposal<sup>25</sup> will be aimed at expanding this term for destruction. The Supervisory Committee understands the MIVD’s position that it should be avoided that possibly important information is destroyed and that for that reason the term for destruction should be extended. In this context the Committee considers that the mere storage of data does not mean an intrusion on the privacy of the persons involved.<sup>26</sup> There can only be such intrusion after a further selection of the data.

The government observed in respect of the term of destruction:

‘An unlimited further selection of these data without any further stipulations is however not possible. Article 8 of the ECHR, which protects among other things the

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<sup>24</sup> Parliamentary Documents II 1999/00, 25 877, no. 9, p. 26.

<sup>25</sup> This proposal will be part of the legislative proposal that sees to the formation of the ‘National SIGINT (Signals Intelligence) Organisation’ (NSO).

<sup>26</sup> See also in this sense: Parliamentary Documents II 1997/98, 25 877, no. 3, p. 44.

freedom of correspondence, violations of which are possible under certain conditions, in our view conflicts with an unlimited further selection without any further stipulations.<sup>27</sup>

The Supervisory Committee subscribes to this starting point and would like to note the following about a possible extension of the term for destruction: the Committee acknowledges that an extension of the term for destruction may involve a more substantial intrusion on privacy, when the material monitored in bulk is selected after non-specific interception. As this intrusion becomes more severe, the assessment of the principles of necessity (art. 18 of the WIV 2002), subsidiarity and proportionality (art. 31 and 32 of the WIV 2002) also becomes more important. Also by expanding the intrusion of the privacy the service will have a greater obligation to motivate its using its power (compare art 27, paragraph 4 sub b and paragraph 5 sub b of the WIV 2002). After a possible extension of the term for destruction the Committee will sharply monitor whether the above principles and requirements have been met.

The Committee considers it important in this context that a further statutory provision is formulated that legalises the MIVD's actions.

## **5. Conclusions and recommendations**

5.1 The Committee has established that the division into countries opted for has (also) resulted in a several problems regarding the alignment of tasks between the services. The Committee recommends the investigation of possibilities for another division with the aim of effecting a better alignment between the various tasks of the two services. This, according to the Committee, leaves unimpaired the responsibilities of the heads of the services for a proper alignment tasks and collaboration.

The Committee recommends that the coordinator of the intelligence and security services (art. 4 of the WIV 2002) is to be involved as closely as possible in the alignment of tasks and activities of the two services in the area of the investigation into the proliferation of weapons of mass destruction.

The practical advantages and disadvantages of a single operational team consisting of the MIVD and the AIVD are to be looked into in more detail.

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<sup>27</sup> Parliamentary Documents II 1999/00, 25 877, no. 9, p. 26.

- 5.2 The Committee considers it necessary that the MIVD properly monitors the status that a source of the service is given, and that a request for permission for the deployment of an agent is timely submitted to and granted by the Minister of Defence in order to avoid unlawfully exercising this special power.
- 5.3 The Committee recommends that the MIVD puts in place an adequate (internal) supervision mechanism in respect of the deployment of sources, so that supervision is maintained over the status that these sources are to be given.
- 5.4 The Committee has established that the MIVD has put in place various reporting lines to the Director of the MIVD for the deployment of informants who run a security risk due to their work for the MIVD. The Committee is of the opinion that the MIVD thus fulfils its obligation to ensure the security of persons with whose cooperation information is collected (art. 15 sub c of the WIV 2002).
- 5.5 The Committee recommends that the MIVD take full responsibility towards a source and to this end supervises this source's activities and also – within its powers – the activities of foreign agents within the relevant cooperative partnership, in so far as these activities could be a reasonably foreseeable security risk for the MIVD's source.
- 5.6 The Committee subscribes to the rule that the Director of the MIVD is to approve the termination of an operation.
- 5.7 The Committee subscribes to the MIVD's position that for the deployment of each agent a separate request for permission is in principle to be submitted. It is important in particular that with respect to each agent an individual assessment is made based on the principles of necessity (art. 18 of the WIV 2002), subsidiarity and proportionality (art. 31 and 32 of the WIV 2002).
- 5.8 The Committee subscribes to the course of action of the MIVD concerning the cancellation of targets that are mentioned in the request for permission for deployment of a selection based on art. 27, paragraph 4 of the WIV 2002. This way it is avoided that a special power is unlawfully exercised towards these persons or organisations.

5.9 The Committee has established that the permission laid down in 27, paragraph 4 of the WIV 2002 has several times been granted by the Minister of Defence whilst exceeding the statutory term. The last few permissions were however granted within the statutory term. The Committee recommends that permission for the selection under 27, paragraph 4 of the WIV 2002 is granted in time.

5.10 The Committee has established that the MIVD has put in place an internal control mechanism with regard to the formulating by the service's analysts of catchwords pursuant to 27, paragraph 3 sub c of the WIV 2002, which entails that random samples are taken from the catchwords entered. The Committee subscribes to this method of checking the exercise of this power.

5.11 The Committee has established that the MIVD deviates from the rule laid down in art. 27, paragraph 9 of the WIV 2002, which means that data that have not been selected may be kept for a maximum period of one year. Data older than one year are currently kept by the MIVD, but no selection is made on these data. The Committee considers it necessary that as quickly as possible further statutory provisions are formulated that legalise the actions of the MIVD in respect to the term for destruction pursuant to art. 27 paragraph 9 of the WIV 2002.

Thus adopted at the meeting of the Committee of 10 August 2005.