

ANNUAL REPORT 2006-2007 of the Supervisory Committee on the Intelligence and Security Services

Introduction

In the year covered in this report (the period from 1 April 2006 to 1 April 2007) the activities and functioning of the two Dutch intelligence services again drew much attention in the media and the political arena. This interest is partly related to a widespread awareness that Dutch society, too, may be a target of terrorist attacks and actions, and partly due to - and enhanced by - several controversial issues. In this context we refer to publications in *De Telegraaf* on the leaking of state secrets by the BVD/AIVD, with their judicial aftermath, and publications in *De Volkskrant* on misconduct by staff members of the MIVD in Iraq. In both instances the Supervisory Committee on the Intelligence and Security Services (hereinafter referred to as: the Committee) conducted an investigation into the facts underlying these publications. Apart from these two investigations in the year under review the Committee completed or instituted, respectively, various other investigations. In this annual report the Committee will enter into these activities in more detail.

Chapter 1. The Supervisory Committee, its composition, organisation and statutory tasks

The Supervisory Committee on the Intelligence and Security Services commenced its activities on 1 July 2003. This is now its fourth annual report. The institution of the Committee is provided for in the Intelligence and Security Services Act 2002 (hereinafter referred to as: the WIV 2002), which became effective on 29 May 2002.¹ By article 1 of this Act these services are understood to consist of the General Intelligence and Security Service (AIVD) and the Defence Intelligence and Security Service (MIVD), which fall under the Minister of the Interior and Kingdom Relations and the Minister of Defence, respectively. The supervisory task of the Committee also covers the coordinator for the intelligence and security services, who falls under the Prime Minister (see article 4). The description of the Committee's duties also includes the supervision over officials employed with the police, the Royal Netherlands Military Constabulary and the Customs and Tax Administration, in so far as these officials carry out activities for the AIVD (see article 60). A legislative proposal is under preparation which also brings officers of the Immigration and Naturalisation Service (IND) under the scope of this article (as part of the so-called Post-Madrid measures discussed in Chapter 6 of this annual report).

Chapter 6 of the WIV 2002 (the articles 64-84) describes the composition, tasks and various other subjects relating to the Committee. The Committee's powers are also referred to in other provisions of this Act, in particular the articles 34, second paragraph and 55, third paragraph. Under article 64, second paragraph of the WIV 2002, the Committee is more specifically responsible for:

- a. supervising the legitimacy of the implementation of the provisions laid down in or in accordance with the WIV 2002 and the Security Clearance Act (WVO)²;
- b. informing and advising (solicited or unsolicited) the relevant ministers ('The Ministers' as referred to in article 1 of the Act) at all times about the findings of the Committee;

¹ See Bulletin of Acts and Decrees 2002, 148 (most recently amended by law of 2 November 2006, Bulletin of Acts and Decrees 574).

² Bulletin of Acts and Decrees 1996, 525.

- c. advising the relevant ministers on the investigation and assessment of complaints;
- d. providing the relevant ministers with unsolicited advice on the so-called notification obligation, laid down in article 34 of the Act, which will become applicable five years after the entry into force of the WIV - thus from 29 May 2007.

Under article 80 of the WIV 2002 the Committee is to issue a (public) report on its activities on an annual basis before the first of May. The report is submitted to both Houses of the States General and the relevant ministers. Article 10 of the Committee's rules of procedure provides that in order to emphasise the current nature of the report, it will cover the period from 1 April of the previous calendar year up to 1 April of the current year. This (fourth) annual report of the Committee therefore covers the period from 1 April 2006 to 1 April 2007. In accordance with article 8, third and fourth paragraph of the WIV 2002, which is also applicable to the annual reports of the Committee according to article 80, this public report will not state any information relating to the means used by the services in specific cases, neither to secret sources or to the current level of knowledge of the services, but it is possible for the relevant Minister to inform the States General of this confidentially. No such information has been included in or attached to this annual report.

For the history and legal powers of the Committee reference is made to Appendix I to the annual report.

Since early 2005 the Committee has had its own website (www.ctivd.nl) on which visitors can find information on its composition, tasks and powers. The website also contains the Committee's supervisory reports once these have been adopted and made public, as well as its annual reports.

Composition of the Committee and organisation of its activities

The Committee's composition remained unaltered in the year under review. It consists of three members who work on a part-time basis, one of whom is chairman, namely:

Ms I.P. Michiels van Kessenich-Hoogendam, member also serving as chairman
Mr C. Fasseur and Mr B.A. Lutken, members.

On 25 August 2003 Ms P.W.M. Wiegers was appointed as administrative secretary of the Committee.

At the end of the year under review the Committee's staff consisted of three (full-time) legal staff members who perform research activities. There are also two administrative staff members. There is room in the budget to extend the staff with two to three researchers. A recruitment campaign has been held for this purpose, which will result in an extension of staff shortly. The Committee's chairman has been charged with the appointment, suspension and dismissal of officers belonging to the staff or the Committee's secretariat, respectively, up to and including salary scale 14.³

Before commencing their activities all the Committee's members and staff were subjected to a category A security screening. The travel restrictions applicable to civil servants of the of the intelligence and security services pursuant to article 10 of the WIV 2002 under article 70 of

³ See Royal Decree of 14 May 2003, Bulletin of Acts and Decrees 258.

the same Act also apply to the Committee's members and staff (except in case of exemption granted by the Prime Minister).

Like the Queen's Secretariat the Committee has a budget statement of its own laid down in the law, in which context the budget of the Ministry of General Affairs is also fixed. Also in the year under review the Ministry of General Affairs has rendered all the cooperation requested to enable an optimal functioning of the Committee's organisation, for which the Committee expresses its gratitude.

Chapter 2. The Committee's procedures

In its previous annual report the Committee reported extensively on its procedures. Therefore in this report the Committee would like to suffice by touching upon several main points and drawing attention to new developments. First, it should be emphasised that the Committee is free in choosing the subjects of the supervisory reports to be issued by the Committee. The Committee can however be invited by the two houses of the States General to perform a specific investigation (compare article 78, second paragraph, of the WIV 2002). Of course, if at all possible, the Committee will grant such a request. After all, the Committee sees it as one of its most important duties by means of its reports and investigative activities to make every effort to enable the States General to effect its parliament's duties in so far as its parliamentary control task is involved. For this purpose the Committee tends to conclude each of its reports with a list of recommendations which may be useful to the services, the ministers responsible for the services, and the States General. In the periodic consultation with the standing committees from the Lower House which are more specifically involved in the functioning of the intelligence and security services – the Committee for the Intelligence and Security Services, the Parliamentary Committee for Interior Affairs and Kingdom Relations, and the Committee for Defence –, it is customary that if desired the Committee provides additional oral information relating to its reports and findings. Consultations were also held with the standing parliamentary Committees for Defence and Interior Affairs from the Upper House of the States General.

The Committee has decided to list the recommendations and proposals made in its supervisory reports, as well as any commitments in this respect from the relevant ministers and the actual execution thereof. This also sees to a useful evaluation of the effects of the work of the Committee since its formation in mid-2003. In the next annual report, or in an earlier separate publication, this list will be communicated in so far as it is suitable for making public.

At the time the legislator made an effort to ensure the Committee's independent position. As a result of its independent position, observing the relevant statutory provisions, the Committee determines its own procedures. For example, pursuant to article 73 of the WIV 2002 the Committee has direct access to *all* information processed within the context of the implementation of the WIV and the Security Clearance Act. At issue is therefore not only information contained in documents issued by or authorised by the executive level of the services, but also each document found at one of the services which the Committee believes to be relevant to an investigation instituted by the Committee and to the issues related to such an investigation. Furthermore, everyone involved in the implementation of these two Acts, thus primarily the staff members of the services, if so requested by the Committee, is to provide information and cooperate with the Committee in so far as this is necessary for the Committee's proper functioning. The only reservation made to these dual powers is that, if there is cause for this, the services can indicate which specific intelligence in the interests of

national security is to remain for the Committee's eyes only. The cooperation, intelligence and information requested have at all times been provided by the AIVD and MIVD to the Committee's full satisfaction.

The Committee is very much aware that its primary task is the supervision over the *legitimacy* of the services' actions. Within this context the Committee has to take into account that according to the WIV 2002 special powers or means of intelligence (see the articles 20-30) may only be used if this is necessary for the proper implementation of the tasks with which the services have been entrusted (article 18). These special powers or means of intelligence, furthermore, may only be used with due observance of the requirement of proportionality and that of subsidiarity (articles 31 and 32); this means that the use of these powers must be in reasonable proportion to the purpose for which the powers or means of intelligence are used, and the use of less far-reaching, for the citizen and his privacy less intrusive powers or means of intelligence, for example the use of open sources, is not possible..

In the coming into force of the WIV 2002 the legislator assumed that *direct* dispatch to the two Houses of the States General was undesirable, because the minister had to assess the publication of the information presented in such reports, originating from the services, against the interests of the state and national security. Dispatch to the States General therefore occurs through the intervention of the relevant minister. Reference is made to the procedure laid down in article 79 of the WIV 2002. This article assumes that the relevant minister is twice given the opportunity to examine the Committee's report before it reaches the States General. The first time is after the Committee has *drawn up* its report. The minister has the opportunity within a reasonable period to be determined by the Committee, which the Committee has set at six weeks, to respond to the report and its findings. Subsequently the Committee, after having taken cognisance of the minister's observations, *adopts* the report, whether or not in amended form, after which it is sent to the minister for the second time, who will then have to send it to the States General, together with his response, within the period of six weeks.

A disadvantage of this procedure is that it is rather time consuming. In the current practice, whereby the maximum term of six weeks each time act as a minimum period, the procedure covers at least two times six weeks. The result is that the Committee's reports as a rule reach the States General with a delay of approximately three months after completion of the investigation, which makes their topicality more limited. Besides, the practice has developed that prior to offering the report to the minister for the first time, the Committee, also to avoid any misunderstanding or omissions in its reporting, offers the intelligence service in question the opportunity to respond to the contents of the report. Based on these two considerations the Committee is of the opinion that the 'reasonable period' of six weeks adhered to by the Committee, within which the minister is allowed for the first time to respond to the report as it has been *drawn up*, can be shortened, namely to a period of four weeks. Furthermore, it urges to reduce the period of six weeks as laid down in the law, as soon as the occasion for an amendment of the law arises, also to four weeks. For after having received (the major part of) the contents of the report, the minister is already cognisant with this and has had the opportunity to ponder about his response to the States General before he receives the *adopted* report. With the proposed shortening of both periods to four weeks the Committee's reports will have a greater topicality.

Chapter 3. Investigative activities

As stated in its first annual report of 2003-2004 (p. 8), the Committee from its inception has taken the position that the best way to carry out its supervisory and investigative duties, is by means of so-called in-depth investigations, which are reported in supervisory reports, and are to be combined and alternated with random checks. In addition, the Committee also performs structural monitoring.

An in-depth investigation focuses on a complete investigative file or a specific activity of the AIVD or MIVD over a period set in advance, in the context of which the activities performed by the services and special powers employed are assessed on the basis of criteria such as legitimacy, necessity, proportionality and subsidiarity. Also investigations which have not yet been completed by a service can be covered by an in-depth investigation.

A random check is a brief investigation carried out periodically by one of the members of the Committee into the legitimacy (including the necessity, proportionality and subsidiarity) of (parts of) investigations carried out at the AIVD and MIVD, in respect of both the WIV 2002 and the Security Clearance Act. The results of such a random check may lead to formulating the need for an in-depth investigation. Due to the summary nature of the findings resulting from random checks, these ordinarily do not have to be separately reported to the States General as this is done with in-depth investigations in the form of supervisory reports (where appropriate this is done to the relevant ministers and in the annual report).

Structural monitoring is involved if at set times certain categories of decisions or actions of the services are assessed on their legitimacy.

In-depth investigations and supervisory reports

In the period from 1 April 2006 to 1 April 2007 the following supervisory reports were sent to the States General. These reports concern the legitimacy of:

1. The deployment by the MIVD of informers and agents, more in particular abroad; presented to the Minister of Defence on 13 April 2006, who informed the States General on 24 May 2006.⁴
2. The deployment by the AIVD of informers and agents, more in particular abroad; presented to the Minister of the Interior and Kingdom Relations on 4 May 2006, who informed the States General on 12 June 2006.⁵
3. Official messages issued by the AIVD over the period from January 2004 until October 2005; presented to the Minister of the Interior and Kingdom Relations on 1 June 2006, who informed the States General on 5 July 2006.⁶
4. Official messages issued by the MIVD over the period from January 2004 until January 2006; presented to the Minister of Defence on 31 August 2006, who informed the States General on 11 October 2006.⁷
5. The investigation of the AIVD into the leaking of state secrets (the so-called *Telegraaf*-investigation); presented to the Minister of the Interior and Kingdom Relations on 16 November 2006, who informed the States General on 6 December 2006.⁸

⁴ CTIVD no. 8a, *Parliamentary Documents II* 2005/06, 29 924, no. 11.

⁵ CTIVD no. 8b, *Parliamentary Documents II* 2005/06, 29 924, no. 12.

⁶ CTIVD no. 9a, *Parliamentary Documents II* 2005/06, 29 924, no. 13.

⁷ CTIVD no. 9b, *Parliamentary Documents II* 2006/07, 29 924, no. 14.

⁸ CTIVD no. 10, *Parliamentary Documents II* 2006/07, 29 876, no. 19.

6. The legitimacy of the implementation of the Security Clearance Act by the MIVD; presented to the Minister of Defence on 31 January 2007, who informed the States General on 23 March 2007.⁹

7. The Counter-terrorism (CT) Infobox; presented to the Minister of the Interior and Kingdom Relations on 26 February 2007 who informed the States General on **NOG INVOEGEN**.¹⁰

For the complete text of the public part of these supervisory reports which have been presented to the States General, we refer to Appendix II to the annual report. The secret appendix (so far as it exists) of the supervisory reports is brought to the attention of the Committee for the Intelligence and Security Services of the Lower House only. The public reports are also published on the Committee's website (www.ctivd.nl).

Completed investigations which have not yet resulted in reports to the States General

In the year under review the Committee also completed investigations into the legitimacy of the implementation of the Security Clearance Act by the AIVD, the exchange of information between the AIVD and IND (Immigration and Naturalisation Service) and the undesired interference of foreign powers (including espionage). These reports have meanwhile been presented to the Minister of the Interior and Kingdom Relations for his comments and/or for dispatch to the States General. As soon as they have reached the States General they will, in anticipation of the next annual report, be put on the Committee's website.

Other investigations

1. The so-called Iraq investigation

In response to publications in *De Volkskrant* and other media in November 2006 on the alleged misconduct of among others members of the MIVD during the stay in Iraq of Dutch troops in the second half of 2003, the Committee, considering the gravity of the accusations, decided on 7 December 2006 to start an investigation into the legitimacy of the MIVD staff's actions in Iraq in conducting interrogations and/or conducting interviews during said period. The Committee came to this decision not only because such an investigation, although it concerned actions of staff of a Dutch intelligence service abroad, falls within its competence, but also because, if necessary, the Committee will be able to hear the persons involved as witnesses under oath. The investigative committee *ad hoc*, the so-called Van den Berg committee, which was instituted by the Minister of Defence in connection with accusations in the media and which incidentally has a broader brief, does not have this power. Contact is maintained with said committee in order for the mutual activities to be aligned to one another as much as possible, of course whilst maintaining the own independent character of each of the committees. The Committee seeks to publish its findings in the first half of 2007. At the moment of completion of this annual report the Committee had completed the hearing of a large number of people as witnesses and experts.

2. The investigation into the AIVD's assessment process with regard to the attention for Mohammed B.

In accordance with a request from the Lower House in connection with the consultation with the Minister of the Interior and Kingdom Relations of 18 January 2007 on his letter of 18

⁹ CTIVD no. 11a, *Parliamentary Documents II 2006/07*, 29 924, no. 15.

¹⁰ CTIVD no. 12, *Parliamentary Documents II 2006/07*... **NOG INVOEGEN**

December 2006 regarding the evaluation of the government's actions relating to the assassination of Mr Van Gogh¹¹ on 13 February 2007 the Committee announced to be willing to conduct an investigation into the actions of the AIVD prior to this murder and the information collected by this service and assessments made in the context of these actions. More in particular the investigation focuses on the verification and validation of the assessment processes presented by the then Minister of the Interior and Kingdom Relations to the Lower House (including the Committee for the Intelligence and Security Services of this House) with regard to the amount of attention paid by the AIVD to Mohammed B. and his actions, and of the conclusion attached to this by the Minister of the Interior and Kingdom Relations that it cannot reasonably be argued that with regard to Mohammed B. the AIVD should have made different assessments. The Committee seeks to complete this investigation after the summer of this year.

Random checks

No random checks were performed this year. The urgency of such checks has diminished due to an extension of the structural monitoring compared to previous years.

Structural monitoring

1. Ministerial decisions regarding the use of special powers.

In the year under review 2004-2005 the Committee decided to implement the structural, periodical monitoring of the quarterly administrative decisions, in which the Minister of the Interior and Kingdom Relations at the request of the head of the AIVD grants permission to the AIVD to use special powers in those cases in which such permission is described in section 3.2.2 of the WIV 2002. The Committee continued to do so in the current year under review. This form of monitoring constitutes an adequate starting point for further investigation, if the regulations pertaining to granting permission for the use of certain powers have not been observed. It is useful because it also gives insight into the quantification of certain special powers used or particular problems which might occur in this context.

The findings of the structural monitoring prompted the Committee to decide to perform an in-depth investigation into the use of several special powers by the AIVD, more in particular tapping and signals interception. This allows the Committee to perform a more in-depth investigation and to report on this in order for third parties to acquire insight into the AIVD's – whether or not legitimate and/or careful – use of these means of intelligence. The Committee seeks to have completed its supervisory report in the second half of the year 2007.

2. Requests for inspection of information processed by of for the services.

Pursuant to article 55, third paragraph, of the WIV 2002 the Committee is to be informed of any refusals of requests for inspection of information held by the services. The refusal of such requests can take place on the basis of certain grounds for refusal provided by law. Unless the decision entails a complete rejection, most of the time a request for refusal is granted partially, because no information is provided which gives insight into the current knowledge level of the service, but in principle this objection does not apply to information older than five years, unless there are any other grounds for refusal, for example because the information to be

¹¹ *Parliamentary Documents II* 2006/07, 29 854, no. 18.

provided may harm any vital interests of the state or the service's *modus operandi* or the personal privacy of others (see for an overview of possible grounds for refusal the articles 53 and 55).

In order to fulfil its task as well as possible the Committee has agreed with the services that the Committee will receive monthly overviews of any requests for inspection submitted and the decisions taken in respect of these requests.

Based on the information it has received the Committee has made recommendations to the AIVD, which handles the large majority of requests for inspection. The Committee has indicated that in some cases the current practice results in an insufficiently readable dossier for inspection, in which the summary information released is provided without a comprehensible context. The Committee takes the stance that openness is to be pursued, in so far as the interests of national security in the form of protection of sources (for example the former providers of information and other sources of the service) and secrecy of the *modus operandi* allow this. It is fair to assume in this context to make a distinction between requests for inspection relating to information older than twenty years, and information of a more recent date. Information older than twenty years in the Committee's opinion should in principle be released unless serious grounds of national security dictate otherwise. An exception is information that falls under the protection of sources regarding informers, agents and (foreign) counterpart services, which the AIVD rightly considers as a serious ground for refusal. The latter on the condition that the ground for refusal 'protection of sources' is only reserved for the above categories.

Another recommendation the Committee has made is that with regard to decisions regarding requests for inspection the AIVD sees to a more comprehensible, more accessible, in short a more community-minded phrasing. In the Committee's opinion the very legal method of formulating adopted by the AIVD under certain conditions resulted in a lack of clarity.

The Committee's observations have resulted in the AIVD adopting new internal guidelines for handling and settling such requests and effecting a more comprehensible and accessible phrasing.

The Committee points out that the above problem is also important for the implementation of the statutory notification obligation, which is due to take place for the first time in mid-2007 (see Chapter 5).

3. Official messages

In the current year under review the Committee, as reported, issued a supervisory report on the official messages issued by the AIVD over the period from January 2004 until October 2005. Considering the increased use of official messages issued by the AIVD in legal proceedings and the (increasing) evidential value of the official messages, the Committee has announced in its report that it will regularly monitor the AIVD's official messages by means of random checks.

In completing this annual report the Committee is in the process of monitoring the official messages which the AIVD sent out in the period from October 2005 until January 2007. The Committee considers it useful to conduct a new in-depth investigation in the course of 2007 into these official messages, on which it will report to the two Houses of the States General.

Chapter 4. Complaints handling

Any person who wishes to submit a complaint about any actions of the services¹², must – before applying to the National Ombudsman – apply to the Minister responsible for the relevant service. In the handling of these complaints by the Minister, the Supervisory Committee has an advisory role. Pursuant to article 83, third paragraph, WIV 2002, the Minister before rendering his judgment about the validity of the complaint must seek the advice of the Committee. The Committee therefore acts as an external advisory body. Section 9.3 of the General Administrative Law Act is applicable to the advisory role of the Committee. In derogation of article 9:13, second paragraph, General Administrative Law Act the relevant Minister however may not give any instructions to the Committee. This provision is a direct consequence of the independent nature of the Committee.

The consequence of calling in the Committee as a complaints advisory committee is that the Committee will take over the entire investigation into the actions that are the subject of the complaint and the procedures followed, including the hearing of witnesses, up until having informed the Minister. On the basis of written documents and a hearing of the complainant the Committee itself will determine the substance and scope of the complaint, on which it will render an advice. In so doing the Committee is not bound by the Minister's interpretation of the complaint or by his view that a specific part of the document in which the complainant has phrased his complaint should be disregarded in the Committee's advice. Another view would be inconsistent with the provision of article 83, third paragraph, of the WIV 2002, which provides among other things that the Minister cannot give any instructions to the Committee.

Procedure regarding the handling of complaints

On receiving a complaint on which it is to render an advice, the Committee will first inspect the files at the intelligence and security services in hand (if such files exist). Subsequently the Committee will hear the complainant unless such a hearing is unnecessary because the complaint has been declared unfounded or the complainant has stated not to make use of the right to be heard (article 9:15, third paragraph, General Administrative Law Act). As a rule hearing the complainant is not done by the full Committee but is assigned – in accordance with the provision of article 9:15, second paragraph, General Administrative Law Act – by the Committee to its chairman or a member. After hearing the complainant, the person who is the subject of the complaint is permitted to present his views regarding the complaint. In this context it is possible for the Committee to allow the parties to submit a reply and rejoinder.

If for the sake of completeness of the investigation it is necessary to hear witnesses, the Committee can decide to do so. If it deems this necessary for the proper performance of its tasks, the Committee can also call in experts in accordance with article 74 of the WIV 2002. Incidentally, the Act does not permit hearing witnesses under oath in a complaints procedure. The article in question, article 75, is part of section 6.2.1 of the Act, which contains general provisions pertaining to exercising the supervision, whereas the complaints procedure is described in section 6.5 of the Act. An amendment of the Act would appear in order, because the National Ombudsman does have the power to hear witnesses under oath in case of

¹² Services in this context are understood to mean Ministers (of the Interior and Kingdom Relations, Defence and General Affairs), the heads of the services (AIVD and MIVD), the coordinator, and the persons working for the services and coordinator (article 83, first paragraph, of the WIV 2002).

complaints against the services; it would be somewhat odd if the Committee did not have this power.

After inspection of the files and hearing the persons involved, the Committee will assess whether the service that is the subject of the complaint, has acted properly towards the complainant and has observed the prevailing or applicable standards. In this context the Committee has a broader framework for assessment than it has with respect to its supervisory task which is limited to the issues of legitimacy.¹³ The Committee subsequently will send a report of its findings accompanied by an advice and any recommendations to the relevant Minister (article 9:15, General Administrative Law Act). Since under article 82 in conjunction with article 15 of the WIV 2002 the Committee is obliged to observe secrecy, it will render its advice in such a way that secrecy is guaranteed.

Before calling in the Committee for advice on the validity of the complaint, the Minister will first allow the service involved the opportunity to settle the complaint in an informal way. This is in accordance with the legislator's view, who felt that needless formalisation and bureaucracy were to be avoided.¹⁴ The Committee is also of the opinion that in principle the services are to be given the opportunity to settle the claim informally.

In its capacity as complaints advisory committee the Committee only has an advisory task in the meaning of article 83, WIV 2002, if the Minister has received a formal complaint. However, not all formal complaints require that the Committee is called in. If a complaint is inadmissible based on article 9:4 General Administrative Law Act or if it is not taken up based on the provisions of article 9:8 General Administrative Law Act, then the advice of the Supervisory Committee is not required. Only in so far as the assessment of the validity of the complaint requires a substantive assessment, is it necessary to call in the Supervisory Committee. In other words: if the Minister refrains from giving a decision on an action, then the Committee does not have to advise. Manifestly unfounded complaints on the other hand are not excluded from the obligation to handle all complaints.¹⁵ The Committee should, however, in principle advise on such complaints. Article 9:10 of the General Administrative Law Act however releases the Committee in such cases from the obligation to hear the complainant (as is also the case if the complainant has stated not to use his right to be heard).¹⁶

Complaints handled

In the context of its advisory role the Committee in the period under review rendered an advice to the Minister of the Interior and Kingdom Relations and/or the Minister of Defence on two complaints. One complaint related to the actions of (staff members of) the AIVD, the other to the MIVD. The Committee heard the complainants and allowed the AIVD and the MIVD the opportunity to be heard, which the services made use of in both instances. After careful investigation the Committee gave the advice with respect to the first complaint to declare it unfounded, except for an (implicit) component of the complaint, on which the

¹³ The legitimacy is an aspect of the decency standards that are assessed in the handling of complaints. Parliamentary Documents II 1997-1998, 25 837, B, p. 6.

¹⁴ See Parliamentary documents II 1997/98, 25 837, nr. 3, p. 7.

¹⁵ Contrary to the National Ombudsman (compare art. 9:23 opening words and sub b General Administrative Law Act) under the regime of the General Administrative Law Act the Minister is obliged to handle manifestly unfounded complaints.

¹⁶ *Parliamentary Documents II 1997-1998, 25 837, B, p. 4.*

Committee advised to declare it partly founded. In the other case the Committee advised to declare it partially unfounded and for the remainder decided that the validity of the complaint had not been established. In both case the Minister in question has adopted the advice of the Committee on whether the complaint was (un)founded and reported this to the complainant. In the case of the first complaint an appeal has been instituted to the National Ombudsman, on which appeal no decision has been given to date.

Chapter 5. Other activities

Introduction of the notification obligation

On 29 May 2007 – thus exactly five years after the coming into effect of the WIV 2002 – the notification obligation laid down in article 34 of this Act, will come into effect. The notification obligation, briefly put, means that the persons involved will be informed of certain special powers, as further defined in section 3.2.2. of the Act, that have been used in respect of them, five years after the use of power in question has been terminated. If such a notification is not possible, the Supervisory Committee shall be further informed of this, and the relevant reasons in this context, in accordance with the provisions laid down in article 34, second or seventh paragraph. It will be clear that the introduction of the notification obligation requires careful preparations by the services in question, while the Committee will in addition have supervisory tasks in those cases in which the obligation has not been met. For this reason the Committee has enquired as to how the AIVD intends to give shape to performing this statutory task. It is the Committee's intention to come back to the application of article 34 in more detail in the next annual report.

International contacts

After its establishment the Dutch Supervisory Committee on the Intelligence and Security Services has always sought contact with foreign institutions and organisations entrusted with similar duties. The exchange of experience and the mutual comparison of powers, duties and procedures can have a very inspiring and stimulating effect. In October of the previous year under review the Committee participated in an international conference in Cape Town (South Africa) of supervisory committees on intelligence and security services. Also in that month the Committee briefly visited London, where ideas were exchanged on the supervision over the British intelligence services with members of the relevant parliamentary committee from the Lower House, and with the Intelligence Services Commissioner and the Interception of Communications Commissioner.

As announced in the previous annual report, the Committee, together with the Law Faculty of the Radboud University Nijmegen, will organise an international symposium on the nature and function of the supervision over the activities of the intelligence and security services within the context of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and other relevant treaties on 7 and 8 June 2007 in The Hague. The conference will also focus on the role of parliament, the media and the academic community in this context.

Chapter 6. Legislative matters

It is with interest that the Committee follows the various adjustments and amendments of the WIV 2002 and the WVO which are under preparation. If necessary, in the consultations with

the services involved and public servants of the ministry the Committee makes use of its advisory power. Below follows a concise overview of the amendments and pending legislative proposals realised during the year under review, as well as legislative desiderata in so far as relevant for the Committee's tasks.

New task: providing security and protection

Since 29 December 2006 the AIVD and MIVD have the statutory task in the context of the System for Security and Protection to draw up threat and risk analyses (e-task AIVD and f-task MIVD) at the request of the relevant Minister and the Minister of Justice collectively with a view to the security of persons and the protection and security of objects and services.¹⁷ This amendment provides that in the context of this task the services can process information which does not fall under the scope of the traditional tasks, because as yet there is no concrete threat. According to the Explanatory Memorandum the investigation that takes place on the basis of this task, will exclusively consist of consulting overt and covert sources and the hearing of witnesses. The use of special powers is explicitly prohibited in this context.¹⁸

Post-Madrid measures

The main amendment for the Committee concerns the so-called post-Madrid measures – in full: the amendment of the WIV 2002 in connection with the improvement of the possibilities of the intelligence and security services to conduct an investigation into and to take measures against terrorist and other dangers relating to national security as well as several other amendments – presented to the Lower House on 9 May 2006.¹⁹ Underlying this proposal for the amendment is the wish to promote more effective and efficient procedures of the services, among other things in light of the observations made at the time by the Committee on the administrative evaluation of the AIVD (Havermans Committee).²⁰ The proposal owes its name to the supplementation and prioritising which took place as a result of the attacks in Madrid on 11 March 2004.

A central part of the proposed amendment is the obligatory provision of information by the administrative bodies as well as persons and authorities who professionally work in the financial sector or transport sector. While in the present situation the provision of information to the services takes place mainly on a voluntary basis, by governmental decree administrative bodies and organisations in the financial sector and transport sector may be designated which are subsequently obliged to provide information. Also the above administrative bodies and organisations may be obliged to provide (parts of) automated data files for data analysis, which is introduced as a new special power. The new concept of data analysis has been included in the legislative proposal in a separate article in the chapter on data processing. This collective term concerns among other things the searching of data on the basis of profiles, or comparing data in order to find patterns. Also on account of the increased technical possibilities in this area this form of data processing will now be explicitly provided for by law. Also in respect of another subject, namely (internet) communication, the already existing provisions in the law will be adjusted to recent technological developments in order to allow that the obligation to cooperate can also be imposed on the providers of these services.

¹⁷ *Bulletin of Acts and Decrees* 2006, 574, 719.

¹⁸ *Parliamentary Documents II* 2004/05, 30 070, no. 3 (MvT), p. 5.

¹⁹ *Parliamentary Documents* can be found under serial number 30 553.

²⁰ *Parliamentary Documents II* 2003/04, 29 200 VII, no. 61, p. 3-4.

Other parts of the proposed amendment concern several adjustments to the special powers to incorporate and use legal entities and to promote or take measures. Lastly, it is proposed to reduce the appointment procedure for the members of the Committee by designating the recommendation list drawn up by the vice president of the Council of State, the president of the Supreme Court of the Netherlands and the National Ombudsman *ipso jure* as a recommendation to the government after this has been open for inspection at the Lower House during a period of six weeks.

Amendment Security Clearance Act

On 20 September 2006 a proposal for amendment of the Security Clearance Act (WVO) was presented to the Lower House.²¹ In addition to the adjustments of the Act in connection with an investigation into the enforceability of the WVO²² this proposal also contains a recommendation from the Oord Committee on boosting the security investigations for civil aviation.²³ The intention of the latter is to make it possible for the AIVD to systematically retrieve judicial information and information for prosecution purposes as well as information from police registers in order to see whether an intermediate, renewed security investigation into the person involved is to be performed. For the remainder the proposal contains several amendments for specifying or clarifying the Act.

Other relevant amendments

In the year under review the AIVD and MIVD were referred to not only in the parliamentary discussions on the above amendments of the WIV 2002 and the WVO, but also in the course of various other amendment trajectories. The meanwhile adopted Witness Secret Identity Act in which the possibilities were extended to use information from the AIVD in criminal proceedings, was the subject of extensive debate.²⁴ Also within the context of the Police Information Act²⁵, the Administrative Measures National Security Act²⁶ and the already adopted Legislative Proposal to Amend the Code of Civil Procedure, the Penal Code and several other acts to extend the possibilities for the investigation and prosecution of terrorist crimes²⁷, the involvement of the services in these statutory provisions was frequently discussed.

General governmental decree in accordance with article 21, seventh paragraph, of the WIV 2002

The Committee has repeatedly urged, in accordance with the provisions laid down in article 21, seventh paragraph, of the WIV 2002, to set further rules via or pursuant to a governmental decree, with regard to the deployment of agents, in so far as they might perform activities

²¹ *Parliamentary Documents II* 2006/07, 30 805, no. 1.

²² *Parliamentary Documents II* 2004/05, 29 843, no. 1.

²³ See the letter of the Minister of Justice, also on behalf of the Ministry of Defence and the Ministry of the Interior and Kingdom Relations, of 1 July 2005 on the Security policy civil aviation. *Parliamentary Documents II* 2004/05, 24 804, no. 30, p. 3.

²⁴ In full the legislative proposal on amending the Code of Criminal Procedure in connection with arranging for the hearing of witnesses whose identity is kept secret and several other subjects. *Parliamentary Documents* can be found under serial number 29 743.

²⁵ *Parliamentary Documents* can be found under serial number 30 327.

²⁶ *Parliamentary Documents* can be found under serial number 30 566.

²⁷ *Parliamentary Documents* can be found under serial number 30 164.

which may result in cooperation being rendered to committing a criminal offence or the actual committing of a criminal offence (see p. 28 of the previous annual report). The then Minister of the Interior and Kingdom Relations announced on 1 February 2007 that said governmental decree was expected to be published in the course of this year and will be dealt with in the context of the post-Madrid measures.²⁸

General power to request information from third parties

In the pending legislative proposals and the meanwhile adopted amendments the general power of the AIVD and the MIVD to request information from third parties is extended in various ways. In the first place administrative bodies can be designated as bodies that are obliged to provide information upon the request of one of the services (the proposed article 17a in the legislative proposal containing Post-Madrid measures). In addition, there is an intention to create a statutory possibility for direct automated access to data files of third parties (the proposed articles 17, third paragraph and 62, third paragraph). Furthermore, within the context of the new task 'to provide security and protection' (the so-called e-task for the AIVD and the so-called f-task for the MIVD) it is possible to use the general power to request information from third parties, as a result of which the possibility of requesting information will also be expanded to include wider circles.

Requesting information from third parties is a general power of the AIVD and the MIVD, which they can exercise in the performance of their task. It is a form of information processing (article 1, sub f), to which the general provisions of the WIV 2002, in particular the articles 12 and 13, are applicable. This means that requesting information may only take place for a specific purpose and only in so far as necessary in order for the proper performance of the service's tasks (article 12, second paragraph). In addition, the requesting of information has to be in accordance with the law and take place in a decent and careful way (article 12, second paragraph). Article 13 limits the circle of persons on whom the AIVD and the MIVD are permitted to process information.

Outside of the general provisions there are no (special) rules and restrictions attached to requesting information from third parties. For example, there is no procedure for permission and no written record is required, as is the case when a special power is used – for example in case of tapping (tele)communication (articles 19 and 33).

Because of the ever increasing possibilities to request information from third parties, the AIVD and the MIVD have to be attentive to preventing the coming about of undesirable situations in which the requirement of proportionality might be put under pressure. For example, the intelligence services might feel inclined to place excessive 'orders' with third parties or – hypothetically – could even give instructions as to how third parties should obtain the information ('steering'). This could result in a situation in which requesting information takes on characteristics of exercising a special power of its own by means of the (technical) support of another body. So far the Committee has not come across such a situation in the course of its investigations. In view of the ever increasing possibilities to request information from third parties the Committee advises a vigilant approach in this context.

Final observation

²⁸ See *Parliamentary Documents II* 2006/07, 30 800 VII/ 29 876, no. 39, p. 8-9.

It has pleased the Committee to find that in the year under review both on the side of the relevant ministers and on the side of the States General there were various, sometimes public, expressions of confidence in the work of the Committee and in the quality of the reports issued by the Committee. For the Lower House this occasionally gave rise to urge the Committee to take on investigations that were *not* directly related to or arose from the statutory description of the Committee's tasks. The Committee of course appreciated the confidence in its activities that is reflected in such requests. If in future such requests become more frequent, it will be necessary to carefully weigh up how the obviously limited manpower and resources of the Committee can be put to the best use. As in previous years, the AIVD and MIVD have made every effort to make it possible for the Committee to perform its supervisory task as well as possible, for which the Committee is grateful.

The Supervisory Committee on the Intelligence and Security Services,

I.P. Michiels van Kessenich-Hoogendam (chair)

B.A. Lutken

C. Fasseur