



**Annual Report**  
**2015**



**Review Committee  
on the Intelligence and  
Security Services**



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# Preface

## A question of trust

In the summer of 2015, when the Dutch government was on the point of putting out a draft proposal for a new act on the intelligence and security services (ISS Act) for internet consultation, a report was published in the United Kingdom entitled: *A Question of Trust*.<sup>1</sup> An eye-catching title for an evaluation of British law on the investigatory powers of the intelligence and security services. "If one thing is certain, it is that the road to a better system must be paved with trust", explained David Anderson Q.C. in the report that he compiled at the request of the British Prime Minister. The British parliamentary reviewer went on to say that the services must function on a more "out of the shadows" basis.<sup>2</sup> The public's trust can only be won with greater openness. That is not blind trust but trust that is informed by clarity about powers, practices and guarantees and the oversight thereof.

It is in the light of this vital sense of trust in the application of the secret services' powers, that the work of the Dutch Review Committee on the Intelligence and Security Services (CTIVD) should be regarded. The CTIVD aims to use independent investigations into the legality of the intelligence and security services' activities in order to gain the public's confidence that there is effective oversight of the balance between national security and protection of the citizen and his/her private life. It achieves this by assessing the work of the General Intelligence and Security Service (AIVD) and the Military Intelligence and Security Service (MIVD) according to the rule of law.

The Committee is of the opinion that the AIVD and MIVD work professionally. The interests of national security versus privacy are carefully evaluated both on the work floor and at management level. If the CTIVD, however, believes that this assessment has been erroneous, and this certainly occurs, it will be reported publicly so that measures can be taken internally and at government and political levels.

The Committee's public reports thus contribute towards the constructive debate on the intelligence and security services. This is particularly important now, as a new act on the intelligence and security services, which includes a substantial expansion of powers for the services, is currently being elaborated. During internet consultations in the summer of 2015 on the draft bill for a new ISS Act, it transpired that in order to gain broad public trust in this expansion, there would have to be a more detailed explanation of the 'why' than has previously been the case. The Committee itself, in its response, also mentioned several topics about which there should be increased clarity. It also explained where added guarantees for the protection of privacy would have to be integrated. The Committee is of the opinion that the effectiveness of independent oversight must be strengthened by making its judgements binding, in line with European legal standards.

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<sup>1</sup> UK Independent Reviewer of Terrorism Legislation, David Anderson Q.C., *A question of trust. Report of the investigatory powers review*, June 2015, p. 245

<sup>2</sup> Intelligence and Security Committee of Parliament, *Privacy and Security: a modern and transparent legal framework*, March 2015, p. 108

The debate on the new act will develop in 2016. In the meantime, the Committee will continue to work on investigations within which the balance between national security and privacy is reviewed from a variety of perspectives. The Committee is very familiar with the AIVD and MIVD. It has unrestricted access to all information from every operation and may engage with all of the service's employees. It thus has a unique position. In 2016, it will work on contributing to the social, political and academic debate in line with its position as an independent oversight body.

**Harm Brouwer**

Chairman of the Review Committee on the Intelligence and Security Services



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# Introduction

The Review Committee on the Intelligence and Security Services (CTIVD) reviews the legality of the activities of the General Intelligence and Security Service (AIVD) and the Military Intelligence and Security Service (MIVD). It conducts investigations that result in public reports with, where necessary, confidential appendices. In addition, it explores the core activities of and developments within the services, in order to be able to carry out ongoing oversight. It also explores the activities of the services on a thematic basis and functions as a complaints committee in the event of complaints about the AIVD and MIVD.

Every year, the Committee publishes an annual report before 1 May which is offered to parliament and the ministers concerned. The annual report is made public. It is also translated into English. Previously, the reporting year covered 1 April to 31 March. For the sake of clarity, the CTIVD changed this to calendar years. 2015 is a transitional year. The period up to 31 March 2015 has already been dealt with in the annual report 2014-2015. This annual report for 2015 therefore covers the period from 1 April to 31 December 2015.

[▶ Read the annual report 2014-2015 here](#)

In chapter 2, the Committee provides a short description of the review reports that have been published in this reporting year. In chapter 3, you can see which investigations were carried out and concluded in 2015 and which investigations were launched in 2016. Chapter 4 sets out complaints that have been handled by the Committee and the themes therein. In chapter 5, the Committee sets out the knowledge network it has created. Chapter 6 examines developments in relation to the new act on the intelligence and security services (ISS Act). In chapter 7, you can see how the Committee cooperates on an international level. Finally, chapter 8 explains the composition of the CTIVD in 2015.

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# Which investigations did the CTIVD conclude in 2015?

In the period 1 April to December 2015, the Committee published the four following review reports:

- MIVD cooperation with foreign services (no. 22b)
- AIVD and MIVD and the crash of flight MH17 (no. 43)
- MIVD sigint operations in the Horn of Africa (no. 44)
- AIVD information on possible accomplices to Mohammed B. (no. 45)

Below, you can find a brief summary of these reports' findings and conclusions.

## **No. 22b | MIVD cooperation with foreign intelligence and security services**

*Publication date: 27 July 2015*

International cooperation is vitally important for intelligence and security services. This could include exchanging personal data, providing support and conducting joint operations. In this report, the Committee reviewed whether the MIVD's cooperation with foreign intelligence and security services in the period from the beginning of 2007 to the end of 2013 took place within legal frameworks. The Committee's view is generally positive, both with regard to bilateral and multilateral cooperation. The Committee found, for example, that the most far-reaching forms of cooperation only took place with foreign services that fulfilled the criteria for cooperation, such as respect for human rights and democracy. In a few cases, permission from the Defence minister in relation to rendering assistance to foreign services had not been sought and this was found to be unlawful by the Committee. The most important recommendations from the Committee relate to the modification of internal policies, including the procedure and level of decision making with respect to (personal) details. In its response to the report, the minister largely endorsed the Committee's conclusions and adopted the recommendations.



## No. 43 | AIVD and MIVD and the crash of flight MH17

Publication date: 13 October 2015

On 17 July 2014, Malaysia Airlines' flight MH17 crashed in eastern Ukraine. The Dutch Safety Board (OVV) conducted an investigation into the events. Part of this investigation included decision making with regard to the safety of flight paths. The question was whether the AIVD and MIVD have a legal task in this context and, if so, how they should go about fulfilling it. It was also important to find out what the AIVD and MIVD knew about the safety of civilian flights above eastern Ukraine before the crash and whether this information had been shared with external parties. As a result of its experience and unrestricted access to information from both services, this element of the investigation was allocated to the Committee. The Committee conducted its investigations at the request of the ministers of Foreign Affairs and Kingdom Relations (BZK) and the ministry of Defence.



*Translated into English.*

[▶ Read the report here](#)

On the basis of its investigation, the Committee established that the tasks of the services in the context of foreign flight paths are currently limited. Both services are tasked with sharing information that indicates a concrete threat to civilian aircraft and the AIVD, in the context of its task to promote the security of vital sectors, is consulted by airlines on flight paths, for example. Before the crash of flight MH17, the services had no information, not even from partner services, that pointed to a concrete threat to civilian aircraft over eastern Ukraine. The information at the services' disposal did not point to one or more actors who were involved in the conflict in eastern Ukraine before the crash having a combination of military resources, opportunities or intention with respect to downing a civilian aircraft at cruising altitude. As a result, the Committee concluded that the AIVD and MIVD, on the basis of the information available, could not have identified a concrete threat to civilian aircraft over eastern Ukraine and reported it to external parties such as the airlines. The report was sent by the CTIVD to the OVV on 8 April 2015. It was published on 13 October 2015 as an appendix to the OVV's report. The OVV adopted the findings and conclusions of the Committee.

## No. 44 | Two MIVD sigint operations in the Horn of Africa

Publication date: 18 November 2015

Dutch military units have been taking part in anti-piracy missions in the waters around Somalia since 2008. In support of these missions, the MIVD used its powers in the mission area to carry out non-targeted interception of telecommunication (the power to select sigint) in two operations. The MIVD thus deviated from legal procedures by not specifying, in advance, whose communication it wished to intercept. This led to the Committee conducting a corresponding investigation. It concluded that the MIVD may only deviate from ISS Act 2002 procedures in mission areas if 1) the mandate in international law offers a legal foundation for doing so and 2) there are significant reasons for doing so. The MIVD must therefore apply a working method that protects the privacy as much as possible. In the report, the Committee explained that this was, indeed, the situation in this instance. The two sigint operations in the Horn of Africa were thus lawful.



*Translated into English.*

[▶ Read the report here](#)


## No. 45 | AIVD information on possible accomplices to Mohammed B.

Publication date: 3 December 2015

In November 2014, ten years after the murder of Theo van Gogh, the debate on this subject flared up once again. The Minister of Internal Affairs and Kingdom Relations asked the Committee to conduct an investigation as a result of parliamentary questions regarding information available to the AIVD about possible accomplices to murderer Mohammed B. and the possible provision thereof to the Public Prosecution Service (OM). The Committee concluded, after a comprehensive investigation, that the AIVD sent official messages to the OM on multiple occasions but that the service had information in ten instances about possible accomplices that was not provided to the OM. This did not relate to concrete indications. The AIVD, however, should have checked with the National Public Prosecutor for Counter-terrorism (LOv) whether this information could have been significant for the OM, prior to deciding not to issue it. It transpired, from the investigation, that this did not occur. The Committee recommends that, from now on, when there are similar, serious criminal offences involved, the LOv is consulted and this consultation is recorded in writing. In his response to the report, the Minister of Internal Affairs and Kingdom Relations adopted the recommendations. In its report, the Committee also covers the issue of whether the AIVD had destroyed recordings that had been made with a microphone in premises on Antheunisstraat in The Hague. It concluded that this was not the case. The recordings are currently available within the AIVD.



# 3



“In order to make the right choice of investigation topics, the Committee ensures that it stays abreast of all relevant developments.”

# What investigations were ongoing in 2015 and what is planned for 2016?

## Ongoing investigations in 2015

In 2015, the Committee began an investigation at the request of the House of Representatives. This involved the implementation of two motions regarding cooperation between the AIVD and the MIVD and foreign services. In addition, the Committee conducted three investigations in the context of its regular investigation programme. Two in relation to interception powers and one on the contribution by the MIVD to targeting. The ongoing investigations are set out in brief below.

### Investigation into the implementation of House of Representatives' motions regarding cooperation between AIVD/MIVD and foreign intelligence and security services

In April 2014, the House of Representatives adopted two motions during a plenary debate about interception by the American intelligence service, the NSA. In motion no. 89, the government was asked to provide further substantiation of the criteria for cooperation with foreign intelligence and security services. In motion no. 96, the House of Representatives identified that sets of (meta) data are exchanged structurally with foreign intelligence and security services and asked the government to only permit this activity if prior permission had been sought from the minister concerned. In both motions, the House of Representatives asked the Committee to monitor the implementation thereof. In July 2015, the Committee announced an investigation into how the AIVD and MIVD interpreted these motions. It concluded its investigation at the beginning of 2016. In spring 2016, individual reports will be published on both motions.

### Investigation into the AIVD's powers of interception

The AIVD's use of interception powers and the power to select sigint was investigated by the Committee with regard to the period from March 2014 to February 2015. The review report was published in February 2016.

## Investigation into the MIVD's powers of interception

The MIVD's use of interception powers and the power to select sigint was investigated with regard to the period from June 2013 to June 2015. The review report was published in March 2016.

## Investigation into MIVD's contribution to targeting

In May 2015, the Committee announced an investigation into the contribution made by the MIVD to targeting. Targeting covers the process of selecting targets (objects and/or persons) and, in the context of (military) operations, destroying them (objects), influencing them or capturing/eliminating them (persons). The Committee's investigation focused on the role of the MIVD with respect to targeting in ongoing and recently concluded missions and the relevant cooperation with foreign services since 1 January 2013. In addition, the Committee is considering the legal framework relating to this investigation, against which it will check the practices of the MIVD. The Committee will conclude its investigation in spring 2016. The report is due for publication in the second half of the year.

## Annual planning 2016

In 2016, the Committee will conclude the aforementioned, ongoing investigations with the publication of review reports.

In 2015, the Committee also discussed new topics for investigation in 2016. In order to choose the right topics to investigate, the Committee ensures that it stays abreast of all relevant developments. In this context, it focuses on issues within society, media, politics, science and the legal world. It also monitors activities within the services in relation to ICT, sigint and cyberspace. On the basis of this and other things, it makes decisions about starting and substantiating new investigations.

Before it announces an investigation, the Committee explores the topic to be investigated in order to gain an insight into the relevant (legal) issues and the scope and nature of the activities and then determine the focus and principles for the actual investigation.

## Transparency of personal data (AIVD & MIVD)

In 2015, the Committee focussed on the transparency of personal data. In this context, on 3 March 2016, the CTIVD announced an investigation into the topics of notification and access to information at the AIVD and MIVD. The binding element herein is that both topics, according to law, focus on offering individual citizens, where possible, greater insight into the main, classified activities of the AIVD and MIVD in order to ensure that they are (more) capable of implementing the civil rights to which they are entitled. The CTIVD will focus its investigation on the processing of personal data. With respect to the topic of access to information, this means that only requests to inspect personal data fall within it.



## Exchange of data relating to (alleged) foreign terrorist fighters (AIVD)

At the beginning of March 2016, the Committee announced an investigation into the AIVD's exchange of data in relation to (alleged) foreign terrorist fighters. The investigation covers two phases. The initial phase focuses on the AIVD's exchange of data with foreign intelligence and security services, both in a bilateral and multilateral context. This serves as substantiation to the investigation previously announced by the CTIVD into international cooperation by the AIVD. The second phase focuses on data exchange in an international setting. Official messages provided by the AIVD to the Public Prosecution Service, the Immigration and Naturalisation Service (IND) and citizens, fall into this investigation.

## The use of hacking powers (AIVD & MIVD)

Finally, the Committee announced an investigation into the use of hacking powers by both the AIVD and the MIVD (e.g. hacking into a computer). The investigation started in March 2016.

# 4

Complaint:

“The minister concerned adopted the Committee’s advisory opinions for all complaints.”

# What complaints were handled by the CTIVD in 2015?

If somebody has a complaint about the conduct of the AIVD or MIVD, it can be submitted to the Minister of Internal Affairs and Kingdom Relations or Minister of Defence. If the minister decides to handle the complaint, the Committee will be engaged as an independent advisory complaints' commission. The Committee will then handle the complaint. It will hear the complainants and examine the relevant files and/or will hear employees from the service concerned. The Committee will assess whether the AIVD or MIVD's conduct was proper. Ultimately, it will issue the minister with an advisory opinion and the minister will then decide whether the complaint is well-founded or unfounded.

In paragraph 4.1, you can see how many complaints the Committee handled in the period between April and December 2015. The various complaints are set out in more detail in paragraph 4.2.

## 4.1 Number of complaints handled

In the period April to December 2015, the Committee handled nine complaints: seven about the AIVD and two about the MIVD. It subsequently issued advisory opinions to the minister concerned. As the reporting year was being concluded, the Committee was still handling four of the complaints about the AIVD. The Committee has seen the number of complaints stay roughly the same over the past few years, with fluctuations in the extent of content and judicial complexity.

Number of complaints about the AIVD	Number of complaints about the MIVD	Recommendations
-	-	Manifestly unfounded
3	1	Unfounded
3	-	Partly unfounded, partly well-founded
1	-	Partly unfounded, partly well-founded, partly wellfoundedness not established
-	1	Well-founded

The minister concerned adopted the Committee's advisory opinions for all complaints.

## Complaints that were not handled

Two complaints about the MIVD were not handled by the Committee; one because the complaint was eventually withdrawn and one because the minister, after taking advice from the CTIVD regarding reassessing its admissibility, concluded that it was, in fact, not admissible.

## 4.2 Description of handled complaints

Below, is a short description of the complaints handled by the Committee in the reporting year. The description is anonymous because the Committee is not free to publicise individual complaints due to privacy considerations with respect to complainants. This decision can be made by the complainant or the minister in consultation with the complainant. The description is based on the information that the minister has released to the complainants.<sup>1</sup>

### Security screenings

Within both the government and business/industry, so-called positions involving confidentiality have been created. A position involving confidentiality is a role whereby national security could be damaged, e.g. by leaking state secrets or providing access to targets for an attack. In order to fulfil a position involving confidentiality, a VGB (security clearance) must be issued by the AIVD or MIVD. The security screening aims to establish whether there are actions or circumstances that make the person concerned vulnerable in the execution of his role, e.g. by not acting honestly.

If the VGB is refused and the person involved disagrees with this assessment, he can appeal against the decision via the minister, and then appeal to a court of law. There are also situations in which a complaint may be submitted regarding the course of events within a security screening, e.g. because the person concerned feels that he has been treated unfairly or because the screening has not been carried out with sufficient speed. In the period April to December 2015, the Committee processed three complaints: two about the AIVD and one about the MIVD.

All three cases involved a time-limit being breached. The complaints involved a lack of communication on the progress of the investigation. One complainant also felt unfairly treated by the AIVD and claimed that the AIVD had applied unlawful methods.

The Committee concluded, in each of these cases, that the services should have been more active in terms of keeping complainants informed about the progress of the screening. The fact that they had neglected to do so, without providing justification, was deemed to be improper conduct. Each of the three complaints was thus assessed as well-founded.

The breach of a time-limit in the complaint about the MIVD was improper conduct; the complaint was thus considered to be well-founded.

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<sup>1</sup> The anonymous nature of the data means that references are simply made to *the complainant* and 'he' however, this could also be a reference to a female complainant.

In the first complaint about the AIVD, the time-limit breach was not unreasonable and this part of the complaint was thus deemed to be unfounded. The part of the complaint that related to a lack of communication was well-founded.

In the second complaint about the AIVD, the time-limit breach, along with the lack of communication, led to the complaint being deemed to be well-founded, given that the investigation did not progress for several months without any good reason. The Committee was unable to establish whether there had been unreasonable treatment because statements varied on this subject. The wellfoundedness of this part of the complaint could not be established. In this complaint, the Committee also established that the AIVD had not applied unlawful methods, and also that the AIVD had not acted improperly with respect to other elements of the complaint. The complaint was thus deemed to be unfounded with respect to these elements.

## Provision of information about people

Essentially, the investigations conducted by the AIVD and MIVD serve the purpose of providing information that is in the interest of national security to external bodies. This primarily focuses on Dutch organisations which are authorised to take measures on the basis of the information provided, such as the responsible administrators or the office of the Public Prosecutor. It could also involve foreign intelligence and security services with which there are cooperation agreements. The ISS Act 2002 sets forth requirements for national and international provision of information, particularly with respect to personal data.

In the period April to December 2015, the Committee processed two complaints about the provision of an official message by the AIVD to national organisations and one about the AIVD providing information to foreign authorities.

One complaint related to the moment at which an official message was issued. After the complainant had been acquitted in a criminal procedure, the AIVD claimed in an official message sent to the Immigration and Naturalisation Service (IND) that the complainant was a risk to national security. The complainant found this to be unlawful. The Committee established, on the basis of the underlying documents, that the AIVD could have reasonably come to its conclusion. The official message's moment of issue was not illogical given the fact that, at that moment, the IND required the information. The complaint was thus deemed to be unfounded.

Another complaint related to the accuracy of information that was provided to a municipality in an official message and the additional information that was provided verbally. In its investigation, the Committee found no evidence that the information provided in the official message had been factually incorrect. The information was rightly categorised as reliable. This aspect of the complaint was thus assessed as unfounded. The fact that the AIVD had provided information to the relevant municipality verbally, outside the confines of the policy report, was found by the Committee to be lacking due care. The AIVD did not fulfil the standards of reliability and transparency. This aspect of the complaint was thus assessed as well-founded.

In the latter complaint, the complainant claimed that the AIVD had unlawfully provided information to foreign authorities about him. As a result, he was limited in his options to travel to foreign countries. After its investigation, the Committee advised the minister to categorise the complaint as unfounded. The minister did not provide the substantiation for the Committee's advisory opinion to the complainant as this would have provided him with an insight into the service's current level of information. The minister therefore did not reveal whether the suspected AIVD processes had taken place (or not).

## Interception of lawyer-client communications

In two complaints, the complainants claimed that confidential communication between a client and their lawyer had been intercepted.

One complaint related to the AIVD directly intercepting the communications of lawyers working for a certain law firm and also intercepting a client's communication with his lawyer via a tap (indirect interception). The complaint that the AIVD has acted improperly by directly intercepting lawyers' communications was unfounded. The minister did not reveal, for reasons of state security, whether the communications of these lawyers had, indeed, been intercepted (no insights given into actual working methods or level of knowledge). The complaint that lawyers' communications were indirectly intercepted was partly well-founded. The Committee established that the amount of telephone conversations and e-mail exchanges between clients and their lawyers that were worked out was limited in an absolute sense. However, in most cases, there had not been a reasonable consideration of interests by the AIVD. In this situation, the interest of national security was not greater than the considerable interest of professional privilege. The Committee deemed this to be improper conduct. The complaint was thereby deemed to be partly well-founded and partly unfounded.

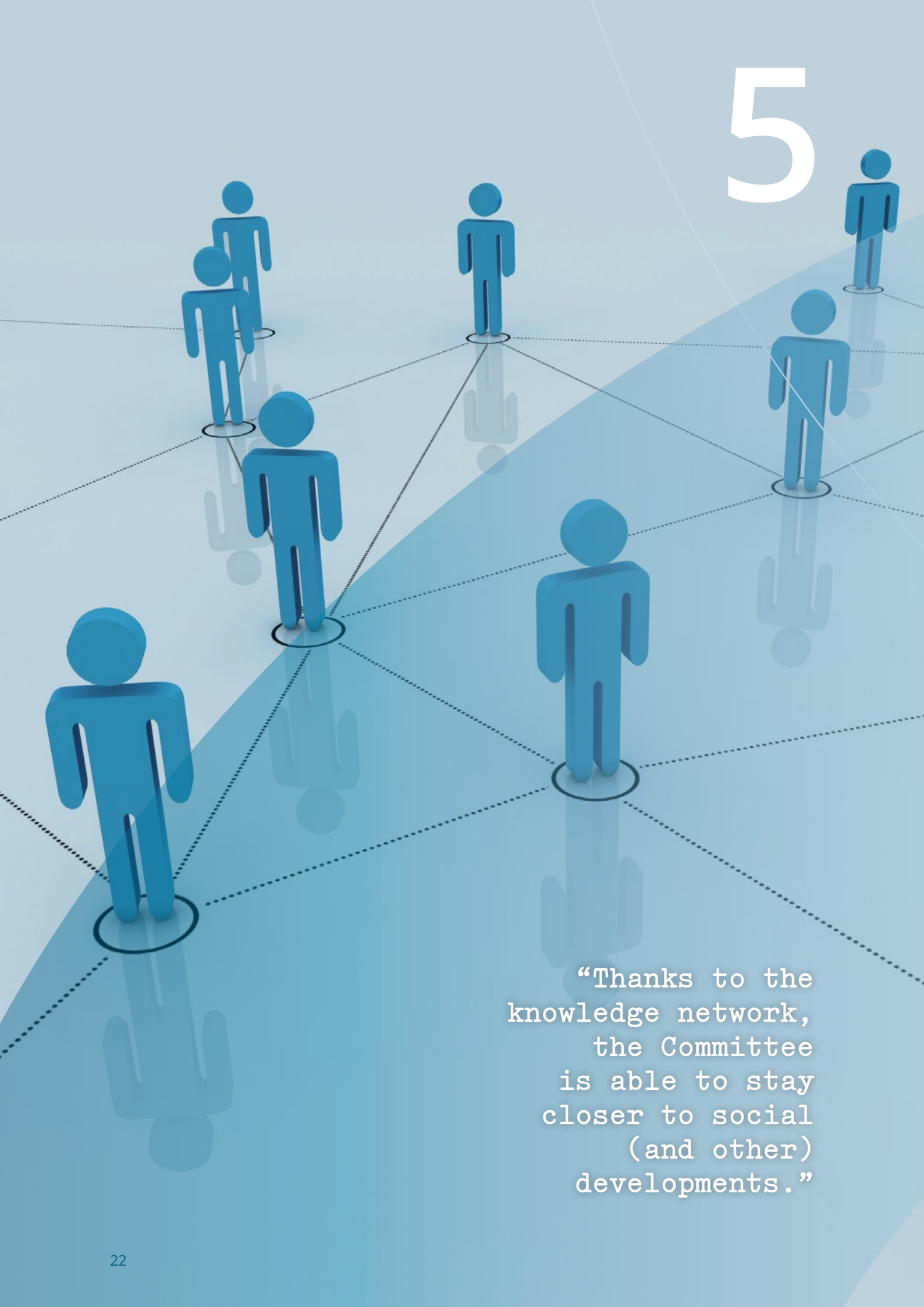
Another complaint focussed on the use of investigatory powers by the MIVD against a lawyer and his client. On the basis of its investigation, the Committee concluded that subject of the complaint had no basis in the facts as established by the Committee's examination. The complaint was thus deemed to be unfounded.

## Other

Finally, one complaint related to the AIVD not fulfilling its agreements. The Committee established that the subject of the complaint had no basis in the facts as established by the Committee's examination. The complaint was deemed to be unfounded.



# 5



“Thanks to the knowledge network, the Committee is able to stay closer to social (and other) developments.”



# What is the added value of the CTIVD's knowledge network?

## Introduction

In 2014, the Committee realised that it needed a stronger connection to the outside world. For the purposes of retaining the quality of its oversight, it recognised the importance of closely monitoring relevant technological, legal and social developments. In December 2014, the Committee therefore set up a knowledge network. The knowledge network comprises scientific experts with diverse specialisations.

## Composition

The knowledge network is made up of:

- Nico van Eijk (professor of information law, University of Amsterdam)
- Bob de Graaff (professor of intelligence & security studies, University of Utrecht, and professor of intelligence and security, Netherlands Defence Academy)
- Constant Hijzen (national security teacher, University of Leiden)
- Mireille Hildebrandt (professor ICT and the constitutional state, Radboud University of Nijmegen)
- Bart Jacobs (professor software security & correctness, Radboud University of Nijmegen)
- Rick Lawson (professor European law and deacon of the faculty of law, University of Leiden)
- Erwin Muller (professor of security & law, University of Leiden, and vice-chairman of Dutch Safety Board)



Photograph: Erik Jansen.

*From left to right Muller, Van Eijk, Hildebrandt, Jacobs and Hijzen. Lawson and De Graaff are not pictured in the photo.*

## Plenary meetings

The knowledge network meets three to four times a year to discuss developments that are relevant to the intelligence and security services. The Committee discusses its plans and visions with this network. The knowledge network can thus provide its input in relation to the choice and focus of the investigations and the CTIVD's activities. Relevant studies and articles are also reviewed. In 2015, the Committee also conducted a thorough exchange of ideas with the knowledge network regarding the draft bill for a new ISS Act. Experience gained over the past year has shown that meetings provide added value for the Committee. Thanks to the knowledge network, the Committee is able to stay closer to social (and other) developments. This is, without doubt, beneficial in terms of its vision and daily investigative work.

## Sounding board

The network's expertise is also used within specific investigations. Since the end of 2015, the Committee has linked individual members of the network to investigations. They advise the investigation group at an early stage about the content, cohesion and the relevance of draft investigation plans, reports and recommendations. The members do not conduct investigation activities and certainly do not have access to information within the services. The Committee has noted that it is very useful to check these investigation activities with scientists who, as outsiders, can reflect upon the principles, methodology and findings of the Committee. The Committee expects that this will benefit the quality of the reports that are published in 2016.

## Bart Jacobs on the knowledge network:


“The atmosphere at the CTIVD is pleasant and non-political. A great deal of thought goes into defining the right questions before an actual investigation is commenced. As the knowledge network, we can contribute towards honing these investigative questions. On the other hand, I imagine that sparring about strategic lines and developments is also useful for the Committee members. I personally find it interesting because it provides me with a better overview of developments and considerations in the context of the intelligence and security services and the oversight thereof.



“The Snowden leaks and the more or less simultaneous review of the law governing the intelligence and security services meant there has been unprecedented coverage of the services’ activities and the corresponding oversight. In this light, I think it was a wise decision by the CTIVD to seek greater external feedback and input by creating a knowledge network. For me, it is not essential for the members of the network to be scientists. They could come from other areas of society too. Members should simply have a ‘feel’ for the subject and the underlying themes and possess an analytical approach.

Digitalisation over the past few decades has, of course, not bypassed the intelligence services. The CTIVD has always been a judicial stronghold. A good understanding of technology, however, is vital in order to ensure that the services are functioning correctly and identify any irregularities. I believe an important aspect of my role in the knowledge network is to champion IT within the digital reorientation of the CTIVD, from the perspective of my specialist area, whereby parts of the review process are, for example, automated.”

# 6



“Whichever approach is chosen, it is important that the system as a whole fulfils European legal norms.”

# What are the developments in relation to the new ISS Act?

In July 2015, the draft bill for a new ISS Act was presented for internet consultation. The volume of responses was unprecedented in Dutch legal history. The results varied; both individual citizens and interest groups as well as businesses, scientific institutions and government bodies responded to the draft. The content of the responses demonstrated that the proposal had generated questions and comments from a range of areas.

The ministers concerned had explicitly asked the Committee for a response. The Committee, in its role as independent oversight body on the implementation of the ISS Act 2002, was happy to oblige. On 3 September 2015, it published its response.

The draft bill, among other things, encompassed the government expanding interception powers for both services. Many responses illustrated that there was a need for much greater explanation regarding the need for this expansion. The CTIVD therefore decided not to express an opinion on the desirability (or otherwise) of the proposed expansion of the services' powers. This was outside its remit. Its response focussed on the issue of whether privacy guarantees were sufficiently strengthened and whether it is possible to effectively review compliance. This involves, on the one hand the tasks and position of the oversight body and, on the other, the framework of standards for the application of these powers.

[▶ Read the summary of the response here](#)

## The position of the oversight body

Effective and adequate oversight of the intelligence and security services must fulfil a number of characteristics. The oversight body must:

- (1) be independent, in its appointment procedures and in its assessments;
- (2) be impartial in consideration of interests;
- (3) be expert in legal, operational and technical knowledge and experience;
- (4) issue public reports, for the purposes of parliamentary controls and the social debate;
- (5) have extensive investigatory powers, including hearings under oath and direct access to information and systems, and
- (6) be able to issue binding rulings of unlawfulness.

When the ISS Act 2002 was drawn up, the legislator wanted to position and equip the CTIVD so that it fulfilled the first five requirements. In practice, it has now become clear that the CTIVD is capable of carrying out oversight along these lines. In 2002, the fact that the CTIVD was able to make recommendations on the basis of its findings, without these having to be binding, was considered to be sufficient.

## Binding rulings

In 2015, the importance of the binding nature of oversight once again came up for discussion. Issues that were raised included: Would it be better to give the independent oversight body the power to overrule, so that the minister is obliged to halt operations if the CTIVD find them to be unlawful? And when handling complaints, or with respect to the use of exceptional powers, should this apply in advance or retrospectively? The Committee that evaluated the ISS Act 2002, the Dessens Committee, was strongly in favour of binding oversight by the CTIVD. It was clear that the government had given this a limited hearing in the draft bill: the option of a binding decision would henceforth only be available for complaints. The right to authorize the use of the most intrusive investigatory powers would be exclusively retained by the minister (aside from the use of investigatory powers relating to journalists and opening letters; permission was required from a judge for this purpose). Binding independent oversight of the exercise of investigatory powers – prior or retrospective – was not deemed to be necessary. In its response to the draft bill, the Committee indicated that, given European case law and human rights standards, the suggested system provided inadequate guarantees. In order to offer these guarantees, an independent body must have the power to prevent or halt unlawful activities. The Committee suggested strengthening the oversight with a binding, direct check in relation to the minister's authorisation. There are other options too, such as accommodating the authorisation of the use of investigatory powers within a judiciary institute or another independent body. Whichever approach is chosen, it is important that the system as a whole fulfils European legal norms. This means that, somewhere in the system, there must be the option for an independent body to intervene in a binding manner and provide a substantive assessment of the use of investigatory powers. Many of the responses to the internet consultation asked for this area to be covered more thoroughly.



What exactly does European and international law say about the position of the oversight body with regard to the intelligence and security services? Should rulings be binding? And can an oversight body also function, simultaneously, as the complaints' handler? An expert answer to these questions is given in a study published by the University of Leiden on behalf of the CTIVD in August 2015.

## One review body, multiple tasks?

The CTIVD is currently both the oversight body and (advisory) complaints committee. This combination of roles is advantageous because its experience and expertise can be used for both tasks and a single assessment framework is applied. A disadvantage, however, could be that the Committee's impartiality could come into question. Even though it seldom occurs in practice, there are times when one case must be assessed twice. This was the reason for the government, in its draft bill, to create strict functional and organisational divisions at all levels within the CTIVD between oversight, on the one hand, and the binding handling of complaints, on the other. In reality, two CTIVD's have been created. The Committee, in its response, indicated that this division was too far-reaching. On the one hand, because it is not based on international case law and, on the other, because the added value with respect to expertise and legal unity could be lost as a result. The Committee sees greater value in eliminating any doubts about impartiality by creating two separate chambers, one for oversight and one for complaints, and introducing the option of exemption for members and an option to challenge, for complainants.

The Committee draws attention to the fact that similar discussions have also taken place abroad, e.g. in the United Kingdom (UK). Thus far, the UK has had a system of separate oversight bodies for the intelligence and security services. The fact that this fragmented oversight landscape has proven to be problematic has led to work now being carried out on creating one, single oversight body that will check the use of investigatory powers both in advance and retrospectively. These two roles are accommodated within two different chambers with different members within one supporting organisation. Unbiased decision-making and expertise and consistency in decision-making are thus guaranteed. The CTIVD has a genuinely future-proof model in mind.

## Temporary arrangement on interception of lawyers' communication

In the period after the draft bill for a new ISS Act had been presented for internet consultation, first the County Court of The Hague and later the Court of Appeals of The Hague ruled in a case concerning the AIVD intercepting communication from and with lawyers. The Courts, in line with the Hague's interim proceedings' judge, concluded that the AIVD's activity of intercepting lawyers' communications (both directly and indirectly) was unlawful because the law does not provide for a form of independent, binding oversight. The Court tasked the State to either amend its policy or halt the interception of confidential communication from and with lawyers as of 1 January 2016.<sup>2</sup> On 16 December 2015, the government, while awaiting a formal regulation from 1 January 2016 placed the independent, binding check with the chairman of the CTIVD, as member of a separate, temporary committee.<sup>3</sup> A deputy member will also be appointed who, just like the chairman, is sourced from the judiciary. The creation of a temporary committee is not an ideal situation. The CTIVD regards it as a temporary construction due to the fact that there is no formal basis for the creation of a judiciary body for this purpose. The legal framework which will form the basis upon which the assessment will be carried out, however, is clear. The Committee set this out in its annual report 2014-2015 and also in report 46 on the use of interception powers. In the event that the CTIVD receives complaints about the interception of confidential communication from or with lawyers from 2016 onwards, they will be exclusively handled and assessed by the other two members of the CTIVD in order to avoid any doubts regarding impartiality.

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<sup>2</sup> Court of The Hague, 27 October 2015, ECLI:NL:GHDHA:2015:2881 and Court of The Hague, 1 July 2015, ECLI:NL:RBDHA:2015:7436.

<sup>3</sup> *Parliamentary papers II* 2014/15, 29 279, no. 292 (appendix).





# 7

A satellite is shown in orbit against the blackness of space. The satellite features a large, rectangular grid antenna and a gold-colored thermal blanket. A white parabolic dish is also visible. The Earth's blue and white atmosphere curves across the left side of the frame.

“A theme that lends itself well to a joint oversight project is the exchange of personal data about (alleged) foreign terrorist fighters.”

# How does the CTIVD cooperate internationally?

## Increasing cooperation between oversight bodies as well as intelligence services?

In these times when cooperation between intelligence and security services is intensifying as a result of the cross-border threat from foreign terrorist fighters, there is also the issue of how accountability can be provided in this context. There is no international oversight and this would seem to be difficult to achieve. National oversight bodies are bound to their national mandates and can only conduct limited investigations into the scope and impact of this cooperation. In its annual report 2014-2015, the Committee considered whether national oversight bodies should not look for opportunities to work together. In 2015, the Committee explored this option further with several European fellow oversight bodies.

## Joint theme, own investigation

A theme that lends itself well to a joint oversight project is the exchange of personal data about (alleged) foreign terrorist fighters. This is a frequently occurring form of cooperation between intelligence and security services. Data exchange is both bilateral and multilateral, e.g. in a European setting in the Counter Terrorism Group. This topic is on the agenda of many oversight bodies. The CTIVD announced an investigation into this topic at the beginning of 2016. The intention of this joint project is that each oversight body conducts an investigation into this theme within its own jurisdiction. In 2016, meetings will be held at set moments in order to discuss the findings with one another. State secrets will not be covered and the emphasis will lie on discussing and harmonising investigation issues, the legal framework and relevant European developments. At the end of 2016, findings and best practices will be discussed and methods for reporting in public by the various oversight bodies will be considered.

## Other international contacts

Aside from this project, the Committee also maintains close contacts with its fellow oversight bodies abroad. Expertise, experience and investigation methods are exchanged, both bilaterally and multilaterally. In 2015, for example, the Committee received oversight bodies from Belgium, Sweden, Norway, New Zealand and Italy as its guests. The Committee and its members also visited Brussels, Vienna, Oslo and Tromsø for meetings and conferences.

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# How was the CTIVD organised in 2015?

In 2015 the Committee was made up of Harm Brouwer (chairman), Liesbeth Horstink-Von Meyenfeldt (member) and Aad Meijboom (member). 2015 was Liesbeth Horstink's last year as a member of the CTIVD. As of March 2016, she is succeeded by Marylène Koelewijn.



**Harm Brouwer**  
Chairman



**Liesbeth Horstink-Von Meyenfeldt**  
Member



**Aad Meijboom**  
Member



**Hilde Bos-Ollermann**  
General Secretary

Hilde Bos-Ollermann is the Committee's general secretary. As of January 2016, the bureau comprises seven investigators and two (part-time) secretaries. The Ministry of General Affairs is the managing ministry that provides services to the CTIVD with respect to financial management, ICT and personnel issues. The Committee receives the full cooperation that it requires from the managing ministry. The CTIVD makes its own decisions about spending its financial resources. The CTIVD's budget has been around 1 million EUR per year since its foundation in 2002. In 2014, this was deemed to be insufficient. To strengthen the security chain, from 2016 the government added 0.5 million EUR to the Committee's budget. This, in principle, is enough to cover expected costs for the coming two years. This CTIVD development is separate from the necessary oversight strengthening measures, if the interception powers of the AIVD and MIVD are expanded in the new ISS Act.



Photograph: Erik Jansen.

The CTIVD organisation in 2016: (from left to right) Aad Meijboom, Marylène Koelewijn, Harm Brouwer and Hilde Bos-Ollermann.





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