

Investigation protocol of the Committee

I Oversight objective

a. Purpose of the investigation protocol

The Committee has drawn up this investigation protocol to provide insight into the way it carries out its oversight task. The protocol describes the statutory task of the Committee, the powers available to the Committee and the forms of oversight used by the Committee in carrying out its task. The protocol explains the various steps that must be gone through for each form of oversight. The following investigation protocol serves as guideline for the investigations by the Committee.

The investigation protocol is a public document. It can be consulted via the Committee's website (www.ctivd.nl) and is actively brought to the attention of all parties involved in carrying out the Committee's oversight task.

b. Strategy of the Committee

The strategy is the core assignment of the Committee and guides its activities. It is the Committee's guiding principle for deciding which subjects to investigate.

**By its independent investigation of lawfulness
the CTIVD provides insight into a proper
balance between
national security and protection of privacy**

c. The core values of the Committee

The CTIVD organises its activities in accordance with the following core values. It applies them when carrying out its work through interviews, reporting, presentation and debates.

- The oversight is professional and predictable
- The oversight is focused on facts and it is independent
- The oversight is focused on lawfulness and on directly related efficiency aspects
- Oversight priorities are set and oversight is shaped with an eye to the social context

- The oversight is exercised with maximum transparency and accessibility
- The oversight is designed to result in identifiable products

II. Oversight basis

a. Task

The Committee's task is laid down by law in article 78 of the Intelligence and Security Services Act 2002 (ISS Act 2002). The Committee's task is fourfold:

- a. overseeing the lawfulness of the performance of their tasks by GISS and DISS;
- b. giving requested and unrequested information and advice to the ministers concerned about the findings of the Committee. The Committee may request the ministers concerned to notify either or both Chambers of the States General of the information and advice;
- c. advising the ministers concerned on the examination and assessment of complaints;
- d. advising the ministers concerned of its own initiative on compliance with the obligation to notify.

b. Composition

The Committee is composed of three members, including a chairman. The appointment of the Committee's members is provided for in the ISS Act 2002. At least two members, including the chair, hold a university law degree. Members are appointed for a period of six years and may be reappointed once.

The Committee is supported by a secretariat, which is headed by the Committee secretary. The secretariat is further composed of a number of review officers supported by a secretarial staff.

Investigations are conducted by smaller groups known as investigation groups. An investigation group is composed of one Committee member and at least one review officer. Reports and other documents are drafted and adopted by the Committee.

c. Powers

De Committee has direct and independent access to all data processed in the context of the ISS Act 2002 and the Security Screening Act. The minister concerned, the heads of the services

and other persons involved in the implementation of these Acts must give their full cooperation. The Committee has access to all information systems of both GISS and DISS. The Committee itself decides which data and which cooperation it considers necessary.

For the purpose of carrying out its oversight task the Committee may interview any and all persons involved in the implementation of the ISS Act 2002 and the Security Screening Act. These are in the first place employees of GISS and DISS, but may also include other persons. If the Committee considers it necessary, it may hear witnesses under oath. Employees of the services cannot invoke their obligation of secrecy when they are heard by the Committee. The Committee may hear expert witnesses. Experts are obliged to perform their task impartially and to the best of their knowledge. When interviewing persons the Committee observes the necessity of source protection, which means that it ensures that nothing stated in its reports can be traced to individual persons interviewed by the Committee.

The Committee is authorised to access all places. For entering a dwelling the Committee requires permission from the occupant.

d. Forms of oversight

The Committee aims at laying down its findings, conclusions and recommendations in public review reports. The objective of the Committee is to publish relevant, practice-oriented reports for the information of those working in the field of intelligence and security (GISS, DISS, the ministers involved and organisations carrying out duties under the ISS Act 2002) as well as the States General. For the purpose of attaining this objective, the Committee can use several reporting methods.

- *In-depth investigation:* thorough investigation of an activity of GISS or DISS. Examples of such activities are the exercise of a special power, e.g. telephone tapping, and cooperation with foreign intelligence and security services. An in-depth investigation focuses on an activity or part of an activity that has not yet been investigated by the Committee before. An in-depth investigation can also relate to an activity that was already investigated before, namely where the Committee deems it necessary to subject the activity to a new investigation or to continuous investigation, or where it finds it necessary to further investigate certain aspects that were less thoroughly addressed in the first in-depth investigation. By conducting an in-depth investigation the Committee obtains a picture of

- the activity and examines both the legal framework and operational practice. Each in-depth investigation results in a public review report, with a secret appendix if necessary.
- *Short investigation:* investigation into a specific activity of GISS or DISS characterised by a short timeline. A short investigation enables the Committee to quickly map out a specific activity and report on it in broad outline. The scope of a short investigation is limited because only a specific aspect of an activity is investigated or because the investigation is done by a random check. The legal framework is tailored to the limited scope of the investigation. A short investigation results in a public review report, if necessary with a secret appendix
 - *Follow-up investigation:* investigation of an activity of GISS or DISS already investigated by the Committee before. The Committee has conducted several investigations into the activities of the services. Over time, the Committee may deem it necessary to investigate a specific activity again in order to examine whether the commitments made by the minister in reaction to the first review report have been fulfilled and/or to further investigate certain aspects that were less thoroughly addressed in the first in-depth investigation. It can do so in a follow-up investigation. Each follow-up investigation results in a public review report, if necessary with a secret appendix.
 - *Advice:* if the Committee comes across matters that cannot be incorporated into an ongoing in-depth or follow-up investigation, it may bring the matter to the attention of one of the services and/or the minister on an individual basis. The Committee may request that its advice be also provided to the States General, for example an advice on a proposed change in the law.

Furthermore, the Committee acts as complaints advisory committee in the case of complaints about GISS and DISS. Its advisory opinions issued in this context are not made public but remain confidential between the minister concerned and the person who lodged the complaint. The role and powers of the Committee in the complaint procedure are laid down in a separate complaints protocol, which can also be consulted at www.ctivd.nl.

e. Assessment framework

The assessment framework of the Committee is primarily determined by the Intelligence and Security Services Act 2002 (ISS Act 2002) and the Security Screening Act. GISS and DISS are bound by these Acts when performing their tasks. Requirements arise from these

Acts with which the services must comply in their actions. GISS and DISS must, for instance, satisfy the requirements of necessity, proportionality and subsidiarity and they must have obtained permission at the prescribed level before they may exercise a special power. The Committee assesses whether the services perform their tasks in compliance with the legislative requirements. The Committee also includes relevant international conventions and related case law in its assessment framework. Especially the case law of the European Court of Human Rights is relevant in this context.

In the context of its oversight task the Committee assesses the lawfulness of the acts of GISS and DISS. If a service has acted contrary to the law, for example where the exercise of a special power did not satisfy the legislative requirements of necessity, proportionality and subsidiarity, the Committee will find that the service has acted unlawfully. The Committee will find lack of due care, if data processing took place without satisfying the requirement of proper and due care but the infringement that has taken place does not compel the Committee to declare the act unlawful. This may be the case, for instance, if the reasons stated for exercising a special power are deficient but further examination leads the Committee to conclude that the requirements of necessity, proportionality and subsidiarity were satisfied in this case. In this situation the facts and circumstances justify the infringement resulting from the exercise of the special power, and the deficient substantiation can be repaired. If its findings give reason to do so, the Committee can make recommendations concerning the procedures followed by the services.

III. Investigation

The term “investigation” covers three forms of oversight: in-depth investigation, short investigation and follow-up investigation. As far as their implementation is concerned these three forms have a high degree of similarity. Unless stated otherwise, the following applies to these three forms of oversight.

a. Choice of and preparation for an investigation

In the course of its investigations the Committee sees many aspects of the work of the services. In an ongoing investigation the Committee gets to see a great deal of information and actively seeks information about certain developments at both

services. Some issues are constantly monitored by the Committee. The Committee is attentive to issues concerning the intelligence and security services that are being debated in society. This is one of the reasons why the Committee maintains contact with persons who can interpret certain developments, e.g. in the field of *cyber*. It also happens that society, via the parliament, calls on the Committee's expertise to conduct a more detailed investigation of a specific activity of one of the services. In such a case the Committee may be requested to initiate an investigation. If a specific (new) activity of GISS or DISS gives rise to legal questions about the activity and/or the privacy infringement it entails, this can induce the Committee to initiate an investigation. The Committee's entire investigation agenda is incorporated in an annual programme. The Committee can choose from various forms of investigation:

In-depth investigation

Thorough investigation in the course of which an activity mapped out in its entirety. An in-depth investigation relates to an activity which the Committee has not yet investigated before. An in-depth investigation can also relate to an activity that was already investigated before, namely where the Committee deems it necessary to subject the activity to a new investigation or to continuous investigation, or where it finds it necessary to further investigate certain aspects that were less thoroughly addressed in the first in-depth investigation.

Short investigation

Investigation into a specific activity of GISS or DISS characterized by a short timeline. A short investigation enables the Committee to quickly map out a specific activity and report on it in broad outline. The scope of a short investigation is limited because only a specific aspect of an activity is investigated or because the investigation is done by a random check.

Follow-up investigation

The Committee has conducted several investigations into the activities of the services. Over time, the Committee may deem it necessary to investigate a specific activity again. It can then examine whether the commitments made by the minister in reaction to the first review report have been fulfilled or investigate certain aspects of the subject in greater depth.

The Committee will choose one of the aforementioned forms of investigation depending on the activity to be investigated, the desired scope and the intended reporting method.

b. Plan of action

After choosing an investigation subject, the Committee will establish an investigation group, which is composed of a Committee member and at least one review officer. The investigation group is charged with conducting the investigation.

The investigation group prepares a plan of action. A plan of action for an in-depth investigation sets out, in a general sense, the legal framework for the performance of the activity of GISS or DISS that is to be investigated. It also explains to what extent this activity has already been (indirectly) addressed or touched upon in previous reports of the Committee. A plan of action for a follow-up investigation expressly considers the in-depth investigation that preceded the follow-up investigation. It sets out the conclusions and recommendations included in the earlier report as well as the reaction of the minister concerned. If the minister stated in his reaction that he endorsed a conclusion and/or recommendation, it will be part of the follow-up investigation to find out to what extent the minister has honoured this commitment. In addition, the plan of action explains on which specific elements of the activity to be investigated the follow-up investigation will focus in particular.

The plan of action also lays down the various investigative activities to be undertaken by the investigation group. It describes the scope of the investigation, including the (sub)questions to be answered. As a rule an investigation can be divided into a file examination stage and a round of interviews. The plan of action will include a preliminary proposal as to who will be interviewed in the course of the investigation, usually employees of the services holding key positions in the organisation. The Committee does not limit itself to interviewing (only) managers. After this first round of interviews, further investigation of files or otherwise may be necessary. This may then again lead to another round of interviews.

The plan of action also contains an investigation schedule. The Committee aims at completing in-depth investigations within one year, in the sense that a draft version of the review report will be available for official consultation with the service concerned (see below under *g*) within one year after the announcement of the

investigation. The Committee aims at completing follow-up investigations within six months, in the sense that a draft version of the review report will be available for official consultation with the service concerned (see below under *g*) within six months. A short investigation should be completed within three months at most.

The investigation schedule also states a deadline for evaluating the investigation. The Committee aims at evaluating the investigation within eight weeks after the review report has been debated in the States General.

The plan of action is submitted to the Committee for approval.

c. Announcement

The investigation is announced to both Chambers of the States General, to the minister concerned and to the head(s) of the service(s) concerned.

d. Examination of files

On the basis of the approved plan of action the investigation group examines the files. In most cases the file examination starts with a study (including a study of professional literature on the subject) of the applicable legal framework for the service's activity that is the central focus of an in-depth investigation. If this is e.g. the exercise of a special power, the group will examine what are the requirements arising from legislation and regulations. The legislative history is included in this study. The investigation group examines whether relevant case law exists, both national and international case law, and how it affects the legal framework. This preliminary examination results in the establishment of a legal framework, which forms the basis for assessing the conduct of the service concerned.

In the case of a follow-up investigation it will suffice to analyse whether the legal framework established for the purposes of the preceding in-depth investigation is still up to date, and whether there is reason, having regard to the subject matter of the follow-up investigation, to update certain elements of the legal framework. This will include an analysis of relevant case law developments since the publication of the preceding review report. This preliminary analysis results in the establishment of an updated version of the legal framework, which forms the basis for assessing the conduct of the service concerned.

After establishing the legal framework, the investigation group will examine the files at the service concerned. The investigation group examines the relevant policy documents and other documents relating to the activity under investigation. One of the elements investigated by the group are the applications for exercising special powers and the reasons stated in substantiation of the need to do so. The investigation group examines the descriptions of procedures and operational reports. In addition, the investigation group includes in its investigation the reports made of the various consultative meetings within the services, at both working level and management level. And it examines the decision-making processes preceding specific activities of the service.

The Committee itself has direct access to the digital information systems of the services, including both raw and evaluated data. The Committee may furthermore ask the service for any and all information it deems necessary for conducting the investigation. It can itself gain access to the premises of both services and has a workplace of its own at both.

e. Interviews

Based among other things on the file examination, the investigation group in principle conducts one or more interviews with employees of the service concerned and possibly with third parties (who may include former employees of the service) involved in the service's activity being investigated. These interviews are intended to fill any gaps in the file examination and to help interpret the findings. If the Committee finds it necessary, it can hear persons under oath.

A report is prepared of each interview. These are not verbatim reports but a brief record of the substance of the interview. Audio-recordings are made of the interviews for the purpose of accurate written documentation. The interviewee is informed of this. After the completion of the investigation in question the recordings are destroyed.

The Committee gives every interviewee the opportunity to inspect the interview report at the Committee's offices. If the interviewee holds the opinion that it is not a correct factual record of the interview, a note of his comment is made to the report. There is no question of the interviewee signing the report as correct. The investigation group incorporates such comments in footnotes to the interview report and modifies the report if the comments give reason for doing so.

f. Documentation

When the investigation group believes it has collected all information necessary for answering the questions and subquestions posed in the plan of action, it will record its findings in a review report. The arrangement of a review report depends to a significant extent on the activity of the service that was investigated. The review report will in any case present an idea of the investigation method used, of the legal framework and of the activity as performed in actual practice by the service concerned. The conclusions and recommendations are stated at the end of the review report. The review report also contains a summary. If the Committee holds the opinion that it needs to report on a specific activity immediately while an in-depth investigation is ongoing, may opt to issue an interim report dealing with a specific activity.

The review report is a public document but may have a secret appendix. The data recorded in the secret appendix gives insight into the means used by the service in specific matters (operational methods), into secret sources used by the service and into the current level of knowledge (see also under *h.* below). The Committee embraces the principle that established unlawful acts and recommendations are always mentioned in the public review report. In view of the necessary confidentiality it may be that in the public report the unlawful acts can only be described in general.

A first draft version of the review report is presented to the Committee for approval. After approval, the report is considered drafted.

g. The drafted review report

The drafted review report, without the conclusions and recommendations, is sent to the service concerned, together with the secret appendix, if any. This service has three weeks to react to any factual inaccuracies in the report. The service must in any case present its reaction in writing, but may also explain its written reaction orally. Both the oral and the written reaction must be given within the three-week period set for it. The Committee gives the service concerned two weeks' notice that it will send it a draft report. The service can thus make organisational preparations so that it can give its reaction within the given deadline.

To the extent that the comments of the service concerned so require, the investigation group will make adjustments to the draft review report. The adjusted version of the review report is then discussed in the Committee. If the Committee agrees with the adjustment, the report is considered prepared.

h. The prepared review report

The prepared review report is sent to the minister concerned, excluding the conclusions and recommendations but including the secret appendix, if any. The minister has three weeks to react to the findings. At this stage the minister also indicates whether there are passages in the review report which in his opinion cannot be maintained in the public report because they give insight into operational methods, secret sources and/or the current level of knowledge of the service. If this is the case, the minister may request that these passages be moved to the secret appendix. The minister must in any case give his reaction the report in writing, but he may also explain his written reaction orally.

To the extent that the minister's comments so require, the investigation group will make adjustments to the review report as prepared. The adjusted version of the review report is then discussed in the Committee. If the Committee agrees with the adjustment, the report will be adopted.

i. The adopted review report

The adopted review report is sent to the minister concerned, including the conclusions and recommendations and together with the secret appendix, if any. In its cover letter the Committee explains whether, and if so, in what way the minister's comments on the review report as prepared by the Committee have resulted in adjustment of the report; if a desired adjustment has not been made or a passage has not been moved to the secret appendix, the Committee states the reasons for this. Within six weeks at most, the minister concerned must send the adopted review report together with his reaction to both Chambers of the States General. If the minister holds the opinion that passages have been included in the adopted review report which must not be made public, he will remove these passages from the review report, for instance by making them illegible. The minister must present the secret appendix to the adopted review report to the Permanent Committee on Intelligence and Security Services.

j. Publication of the review report and accompanying press communiqué

Sending the adopted review report to both Chambers of Parliament makes it a public document. The Committee places a digital version of the public review report on its website (www.ctivd.nl). At the same time the Committee issues an accompanying press communiqué in which it explains the main elements of the review report.

k. Evaluation of in-depth investigation

The in-depth investigation is evaluated after the period stated in the plan of action has expired. The *lessons learned* are incorporated in such a way as to be clear, easy to consult and useful for other investigations as well.

IV. Advice

In certain cases the Committee may deem it appropriate to give advice on developments or incidents relating to GISS or DISS which fall outside the scope of an in-depth investigation or follow-up investigation. This may e.g. concern an advisory role regarding legislative matters. Pursuant to the ISS Act 2002 the Committee has the power to give the minister requested and unrequested advice on its findings. In such cases it is for the Committee to give advice on the basis of its specific expertise. This can be an advice to the minister concerned. It may ask the minister to forward the Committee's advice to the States General.