

## SUPERVISORY COMMITTEE

ON

### THE INTELLIGENCE AND SECURITY SERVICES

CTIVD no. 8a

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# SUPERVISORY REPORT

On the Supervisory Committee's investigation into the deployment by the MIVD  
of informers and agents, more in particular abroad

## 1. Introduction

In accordance with its supervisory task under article 64 of the Intelligence and Security Services Act 2002 (WIV 2002) the Supervisory Committee on the Intelligence and Security Services (hereinafter: the Committee) conducted an investigation into the deployment by the MIVD (Defence Intelligence and Security Service) of informers and agents, more in particular abroad. A similar investigation has been conducted into the deployment of informers and agents by the AIVD (General Intelligence and Security Service). A separate supervisory report will be published in response to this investigation at the AIVD. On 9 May 2005 the Committee in accordance with article 78, third paragraph, WIV 2002, informed the Minister of Defence and the Minister of the Interior and Kingdom Relations, and the Chairman of the Lower House and the Chairman of the Upper House of the States General respectively, that it had the intention to conduct the present investigation.

## 2. Definition of the subject and structure of the investigation

Based on the statutory definition of its tasks the MIVD is permitted to carry out intelligence activities abroad. Under its so-called *a* task the MIVD in the interests of national security may conduct investigations into the potential and the armed forces of other powers, for a proper structure and effective use of the armed forces (article 7, second paragraph, sub a, under 1) and into factors that influence or may influence the maintenance and promotion of the international legal order in so far as the armed forces are involved or expected to be involved (article 7, second paragraph, sub a, under 2). In addition, under article 7, second paragraph, under c of the WIV 2002 the service is permitted to conduct investigations abroad within the context of the so-called Counter-Intelligence task<sup>1</sup>. To conclude, the MIVD conducts investigations regarding subjects with a certain military relevance which have been designated as such by the Prime Minister, also the Minister of General Affairs in accordance with the relevant ministers (article 7, second paragraph, sub e). This involves the 'Designation of Subjects Act on the Intelligence and Security Services 2002' order<sup>2</sup> as adopted

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<sup>1</sup> According to article 7, second paragraph, under c of the WIV 2002 this covers investigations necessary in order to take measures to prevent activities that serve to harm the security or preparedness of the armed forces, to promote the proper progress of the mobilisation and concentration of the armed forces, and on behalf of the undisturbed preparations and deployment of the armed forces within the context of the international legal order.

<sup>2</sup> The most recent designation order dates from 13 January 2006, *Government Gazette* 2006, 15, p. 11. This designation order refers to the spheres of activity of both services, which within the scope of the designation order are deemed to cooperate in a closely coordinated fashion. Until 2004 separate ministerial orders were applicable for the investigative fields of the AIVD and those of the MIVD.

on an annual basis. The following subjects were designated in the latest version of the designation order:

- a. developments in the field of international terrorism;
- b. developments in countries relevant within the context of the proliferation of weapons of mass destruction and their means of delivery;
- c. political, ethnic or religious tensions or conflicts in specific countries or regions, irrespective whether these occur within or between countries, that may result in a threat to international stability or the international legal order;
- d. developments that may jeopardise Dutch and European energy supply security.

First, we will provide an overview of the existing statutory provisions on approaching and deploying informers and agents in general (section 3), and of the more detailed elaboration as applied by the MIVD in this context (section 4). Then, following an overview of the legal history, we will discuss the rules applicable to approaching and deploying Dutch (and foreign) informers and agents abroad by the MIVD (section 5). This is followed by a report on a number of specific cases investigated by the Committee in which informers and agents were deployed abroad (section 6). The report concludes with several conclusions and recommendations by the Committee (section 7).

The Committee has decided not to discuss the cooperation between the MIVD and the Immigration and Naturalisation Service (IND) in this supervisory report, but to do this in future supervisory report focusing specifically on this cooperation.

### **3. The statutory framework**

In respect of collecting information by means of human sources, the WIV 2002 distinguishes between *informers* and *agents*. *Informer* is understood to mean: the natural person who due to his position or capacity has, or has the ability to obtain, information that may be important for the service's proper performance of its tasks.<sup>3</sup> Incidentally, approaching informers comes under article 17, first paragraph, sub a, WIV 2002. The deployment of agents comes under article 21, first paragraph, under a, sub 1 and 2, WIV 2002. In the latter article an agent – in so far as relevant here – is described as: the natural person, who, whether or not under cover of an assumed identity or capacity, under the instructions and responsibility of the service is entrusted with: collecting specific information on persons and organisations that may be important for the service's proper performance of its tasks.<sup>4</sup> The explanatory memorandum to this article puts it a little more succinct: the agent is a natural person who is deliberately deployed by a service to collect specific information that may be important for the service's proper performance of its tasks.<sup>5</sup> For the sake of completeness we also refer to article 21, first paragraph, under a, sub 2 of the WIV 2002, in which the agent is granted the power to promote or take measures to protect interests entrusted to a service, the so-called power to take disruptive measures.

For both an informer and an agent the law presumes that the decision to approach him and deploy him, respectively, is taken by the service. For the informer this follows from article 17, first paragraph, which provides that the service *can apply to* anyone who can provide the

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<sup>3</sup> Compare the explanatory memorandum to the WIV 2002, *Parliamentary Documents II 1997/98*, 25 877, no. 3, p. 31.

<sup>4</sup> Currently a review of the WIV 2002 is being prepared, in which context article 21 will also be reformulated. The cited part of the text will however remain unaltered.

<sup>5</sup> *Parliamentary Documents II 1997/98*, 25 877, no. 3, p. 31.

information required; for the agent this follows from the statutory terminology which refers to the agent being *deployed*. Of course this does not preclude third parties independently applying themselves to the MIVD with an offer to supply information. It will then depend on the service's response whether they will be approached as an informer or agent, or that it is decided not to accept the offer.

Prior statutory permission is not required for approaching an informer. Permission is required, however, for the deployment of an agent. This difference has its origin in the circumstance that in case of an informer no special power is involved; this is different when an agent is deployed. The permission is given by the Minister of Defence in accordance with article 19 of the WIV 2002, but can be mandated to the management of the service and subsequently in turn be further mandated by the management of the service. In the case of the MIVD the permission is granted by the Minister *for the first time*, in case of an extension, by the Director (being the head of the directorate).<sup>6</sup> The system of giving a mandate is thus more limited in scope than with the AIVD, where also in case of the initial deployment of the agent, subject to exceptions, the granting of permission has been mandated to the director (being the head of the directorate) and in case of an extension usually to the team leader. The latter sub-mandate is on the other hand not used by the MIVD. The permission for deployment of an agent is granted in accordance with article 19 of the WIV 2002 for a period of no longer than three months, which period can be extended for an indefinite number of times, each time for a period of no longer than three months. Within the context of the so-called post-Madrid measures it is momentarily being considered whether these periods should be extended; we refer to the supervisory report on the legitimacy of a counter-terrorism operation by the AIVD recently adopted by the Committee.<sup>7</sup>

The agent maintains contact with the service through an employee of the service, the *operator*. The intensity of the contact between the operator and agent of course strongly depends on the actual situation. Apart from the operator the informer can also maintain contact with other employees of the MIVD. In general, contact with an agent will be much more intensive than with an informer, for the essential difference between an informer and an agent, both pursuant to the Act and to the legal history, is that an agent is 'steered'; he operates on the instructions and under the supervision of the service.

Also the service's own employees may be appointed and designated as agents in the sense of article 21. At the time, in the parliamentary documents Minister of the Interior and Kingdom Relations De Vries emphasised that only in 'very exceptional cases' does the service's own personnel act as an agent.<sup>8</sup> In such cases an assumed identity is usually used and a *natural cover agent (nca)* is involved. However, usually an agent is someone from outside the service with good access to information, who operates based on an agreement with the service to collect information, whether or not for a certain remuneration or incentive. For the sake of clarity the Committee recommends limiting the appointment of employees of the service as agents to the exceptional cases described above.

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<sup>6</sup> Pursuant to article 4, under a, sub 2 of the Defence Mandate Regulation the permission for the deployment of an agent will also be given by the Minister in those cases which involve a principle of policy or are of a politically sensitive nature.

<sup>7</sup> Supervisory report CTIVD no. 7 on the investigation conducted by the Committee into the legitimacy of a counter-terrorism operation by the AIVD, 16 February 2006, p. 1-3. *Parliamentary Documents II* 2005/06, 29 924, no. 10 (appendix). See also [www.ctivd.nl](http://www.ctivd.nl).

<sup>8</sup> *Official Reports I* 2001/02, p. 943.

The service is obliged to lay down an instruction for the agent (see article 21, first paragraph, under a, and sixth paragraph of the WIV 2002). This *obligation* to lay down an instruction (the explanatory memorandum incorrectly refers to 'power') serves to enable the actual fulfilment of the responsibility for the deployment of an agent. The agent is therefore to comply with the instructions given to him. The instructions are generally given verbally, but article 21, sixth paragraph, states that the verbally given instructions are laid down in writing by the service. This usually takes place in the report of the operation. It would seem obvious that this written record takes place as soon as possible, for it has two objectives. Not only is it desirable from a perspective of internal management (steering and accountability of operational activities) but also to be able to assess and evaluate the agent's actions in retrospect.<sup>9</sup>

Under article 21, third and fifth paragraph, of the WIV 2002 the agent himself can also under strict conditions, set by the service, perform acts that can result in assisting in committing a criminal offence, or in committing a criminal offence. In this context we refer to the Committee's supervisory report on the legitimacy of a counter-terrorism operation by the AIVD.<sup>10</sup>

The (heads of the) services have a duty of care for the safety of persons – either informers or agents – with whose cooperation information is collected. This duty of care has been laid down in article 15, under c of the WIV 2002. Article 15, under b also describes a duty of care for the secrecy of relevant sources from which information originates. This duty of care will have to be taken into account in making and maintaining contacts with such persons by the services and in using information gathered with their cooperation. In other words: providing information to third parties will have to take place under such conditions that the identity of the informer or agent is not revealed and he is not jeopardised. This will always involve a certain weighing up of interests.

#### **4. The more detailed elaboration by the MIVD of the statutory regulation of the deployment of informers and agents in general**

So far the deployment of informers and agents by the MIVD for gathering intelligence was the special prerogative of the Human Intelligence department (AHM or HUMINT). In order for this deployment to take place in the best way possible, in September 2002 AHM drew up bulky and on occasion highly detailed procedural instructions (hereinafter referred to as the procedural instructions), which, consisting of a loose-leaf system, are regularly adjusted.<sup>11</sup> These procedural instructions thus refer to operating human sources and using the related special powers, partly to guarantee as well as possible the safety of these sources, who in some cases run a high (political) risk, both in the Netherlands and abroad. For this purpose the AHM maintains a network of sources and potential sources as well as an overview of targets. In late 2005 the Counter-intelligence and Security department was given the power from the management of the MIVD to independently deploy agents, besides the Humint department, of course with permission of the Minister and based on the same regulation as the Humint department.

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<sup>9</sup> *Parliamentary Documents II* 1997/98, 25 877, no. 3, p. 31-32 (explanatory memorandum to the Act).

<sup>10</sup> Supervisory report CTIVD no. 7 on the investigation conducted by the Committee into the legitimacy of a counter-terrorism operation by the AIVD, 16 February 2006, p. 3-7. *Parliamentary Documents II* 2005/06, p. 29 924, no. 10 (appendix). See [www.ctivd.nl](http://www.ctivd.nl).

<sup>11</sup> The Committee made use of the version adopted in March 2005.

The procedural instructions referred to above introduce a number of key concepts that are essential for a better understanding of the activities of the intelligence services. In particular the procedural instructions distinguish between *sources*, *informers*, *agents* and *targets*.

A *source* is a general designation used within the MIVD for a person formally approached by the service with the request to voluntarily cooperate on a basis of confidentiality by providing intelligence or by providing operational support, which support for example may consist of hiring a car, emptying a postoffice box etcetera. A source involved in operational support only, is sometimes referred to as a *support source*. The procedural instructions further elaborate on the term source by using the terms informer and agent, in which context reference is made to the statutory framework referred to above, albeit with several deviations.

An *informer* is a general designation used within the MIVD for a person who due to his position or capacity has, or has the ability to obtain, information that may be important for the service's proper performance of its tasks. In the service's perspective an informer is often only prepared to provide such information which he possesses without too much effort or risk. A consequence of this is that he tends not to respond positively to being steered. In this context the MIVD distinguishes between 'active' and 'passive' informers. Active informers regularly provide information that is usually not freely accessible. Passive informers only give information as a result of a specific trip or in response to a specific question formulated by the service. The procedural instructions also refer to incidental informers. These persons are 'interrogated' on a once-only basis because of their knowledge of a specific subject.

Within the MIVD the term *agents* is generally used to designate persons who are deliberately deployed to collect specific information on the instructions and under the responsibility of the service. Agents are also referred to by the service as 'manipulated' sources, because they are characterised by a high level of steering. Steering by an operator or 'operating' is defined by the MIVD as recruiting and supervising sources or agents with the objective of collecting information that is not freely accessible. The term agent is used by the MIVD in a broad sense. For example, public servants employed by the service who as operators make and maintain contacts abroad with informers and agents, are in turn regarded and appointed as agents within the context of fulfilling their duties.

A *target* is a carrier of very specific high-grade (secret) and unique information from whom, because a direct approach is often impossible, without his knowledge and using an operator, source or agent, information is obtained. In this context the possibility remains that a target ultimately may become an informer, source or agent.

This is the terminology used within the MIVD for sources, informers, agents and targets. It is to be commended that the MIVD has not only drawn up easily accessible and up-to-date procedural instructions for its staff, but that it has also attempted to further define the terminology current within a secret service. The Committee does note in this context, however, that on one important item this definition does not correspond with the definition used in the WIV 2002.

The crucial difference between an informer and an agent is, as indicated above, that the latter acts on instructions, thus complying with directions from the service (usually in the person of an operator who steers him) and the former does not. This difference is not of terminological or theoretical interest only. Permission from the relevant Minister is required for the deployment of an agent, whereas this is not necessary for approaching an informer

(see article 19 of the WIV 2002). Therefore an informer can in no way be 'steered', as the instruction referred to above suggests. In this case he stops being an informer and in the system of the WIV 2002 becomes an agent.

Furthermore, the question can be raised whether the broad definition of an agent as used by the MIVD, in which context also public servants employed by the service within the context of their activities as an operator or analyst abroad are designated as agent, is necessary. The Committee is of the opinion that the Act has not been written and is not intended for such cases and that it is not necessary, except in case of extraordinary circumstances, to provide its own public servant with the status of agent.

The internal regulations of the MIVD also contain several general instructions on behaviour of MIVD staff that is to be tested against ethical standards. These ethical standards refer to the contact with the informer or agent, and also pertain to the remuneration of the informer or agent by the service. Special attention is paid to the development stage and break-off stage of the contact, both of which are to take place with due care.

In conclusion, it is pointed out within the service that foreign counterpart services sometimes use procedures and methods that do not fit in with Dutch culture. Examples include the use of mandatory lie detector tests for agents and to a large extent keeping an agent in the dark (as a result of which his safety can be seriously jeopardised). The MIVD considers it its responsibility to make these foreign services aware of national legislation, customs and practices, and to emphasise their positive effect on the deployment of agents. In this approach the agent's motivation and safety play a major role. If the foreign counterpart service is obliged based on its own legislation to know the identity of an agent operating in that country, the latter will have to agree to divulging his identity.

The Committee is of the opinion that the code of behaviour referred to above for the working relationship of operators with informers and agents, can be a useful touchstone for assessing the actions of MIVD employees in both domestic and foreign operations. It would appear a useful exercise to the Committee for both the AIVD and the MIVD, within the context of attempting to arrive at an improved coordination of the activities and procedures of the two services, to compare the two codes of conduct to see if anything can be learnt from such a comparison.

## **5. Special arrangements regarding the deployment and activities of informers and agents abroad**

### *5.1 Legal history*

The deployment of informers and agents for the Dutch intelligence services abroad received much attention from the States General in the discussions on the Intelligence and Security Services Act 2002 (WIV 2002). Of course this is not very surprising. The (often covert) gathering of intelligence from persons and organisations by the deployment of informers and agents, called in and/or steered by the Dutch services, will easily be perceived by the country in question, if it becomes aware of it, as a violation of its legal order and sovereignty, apart from the fact that such activity may be made punishable in that country in the form of a violation of state secrets.

Of particular interest in the parliamentary debate in this context was the question what limits and restrictions are to be imposed on the activities of informers and agents operating abroad. For example, is Dutch law applicable to these informers and agents or the law of the country where the agent is deployed, or no law at all?<sup>12</sup> The ministerial memorandum in response to the report observed the following on this subject.

'As to the limits of the activities of Dutch agents abroad, these are determined in principle by the prevailing legislation in the country in question; for the Dutch legislator cannot unilaterally create powers in other countries. However, in such cases the conditions set by the Dutch legislator to operating within the Dutch territorial jurisdiction, shall also play a role. Powers not given to the services within the Dutch territorial jurisdiction shall not be created as yet by operating abroad and in cooperation with foreign colleagues.'<sup>13</sup>

In response to further parliamentary questions the Minister of the Interior and Kingdom Affairs, Mr K. G. de Vries said:

'In exercising special powers abroad the services must in the first place observe the limits that apply to exercising such powers in our own country. Of course it cannot be that the services are permitted to do more abroad than they are permitted to do within their own country. At the same time, this of course does not mean that the services are permitted to do everything abroad that they are permitted to do in their own country. The Netherlands only has jurisdiction on its own territory and our country is unable to unilaterally create powers in other countries. The limits to the services' possibilities to exercise their special powers abroad are therefore determined in principle by the prevailing legislation in the country in question.'<sup>14</sup>

The Minister deemed it permissible that agents under certain conditions committed criminal offences abroad, within which context he did not specify which criminal offences this included:

'In principle, because agents have to be able to commit criminal offences abroad, as is the case under strict conditions in the Netherlands. For example, violating an obligation to observe secrecy. Unlike in the Netherlands it will not be possible for the agent involved to invoke a ground for exemption from criminal liability, so that, if he is discovered, he will have to face charges before a foreign court.'<sup>15</sup>

In response to the suggestion made to him from the Lower House that an ethical code of conduct would be desirable in this context, the Minister answered:

'It will be clear that the services will observe the greatest reticence and caution in their activities in this context. We consider developing an ethical framework which the services are to observe in their activities an interesting idea in this context, which, incidentally, is not relevant only to the services' activities abroad. Also in their domestic activities the services find themselves confronted with (in principle identical) ethical issues. We therefore wish to take up your proposal (...) to examine together with the Committee for the Intelligence and Security Services whether it is possible to draw up a code of ethical conduct. Of course the Supervisory Committee on the Intelligence and Security Services may also be involved in this process.'<sup>16</sup>

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<sup>12</sup> *Parliamentary Documents II 2000/01*, 25 877, no. 58, p. 4, 8-9, 21 and 27.

<sup>13</sup> *Parliamentary Documents II 2000/01*, 25 877, no. 14, p. 21.

<sup>14</sup> *Parliamentary Documents II 2000/01*, 25 877, no. 59, p. 10.

<sup>15</sup> *Parliamentary Documents II 2000/01*, 25 877, no. 59, p. 10.

<sup>16</sup> *Parliamentary Documents II 2000/01*, 25 877, no. 59, p. 10.

Thus the government saw a task for the Committee in drawing up a code of ethical conduct, which is all the more reason for the Committee to draw attention to this subject.

## 5.2 *The statutory regulation (WIV 2002)*

As stated under 2 article 7, second paragraph, under e, of the WIV 2002 instructs the MIVD to conduct investigations regarding other countries as to subjects designated by the Prime Minister in the 'Designation of subjects Act on the Intelligence and Security Services 2002' order. The interests of national security, as explicitly stated at the beginning of article 7, second paragraph, of the WIV 2002, are the starting point in this context. The explanatory memorandum to the Designation Order, when referring to the content of this *e*-task, says, among other things, that the MIVD is to provide the Netherlands with information in determining its position on foreign policy and in conducting international negotiations that is not possible, or difficult, to obtain through other sources, such as for example diplomatic channels. An example that was given was obtaining missing information that is important from a national security perspective but that is only present with foreign intelligence and security services or can only be obtained through the efforts of one or both Dutch services. These activities are thus complementary to the existing tasks of the Ministry of Foreign Affairs and its representatives abroad. In addition, the *e*-task focuses on gathering intelligence on other countries that enables the MIVD to recognise latent threats to national security at an earlier stage (i.e. before these threats have become apparent on Dutch territory) and to be able to better understand existing threats. In considering these matters, according to the explanatory memorandum to the Designation Order it is insufficient to take into account only the immediate use for the Netherlands in a narrow sense, but to also consider joint European and allied efforts in answering the question whether and to what extent the gathering of intelligence serves national interests.

The WIV 2002 is of course applicable to Dutch territory only. This does not rule out that an informer or agent in the sense of this Act with either the Dutch or a foreign nationality may be deployed abroad based on instructions and directions given to him by the Dutch intelligence and security services, comparable to the way in which also other special powers may be exercised on Dutch territory on behalf of intelligence tasks focused on foreign countries. However, the informer or agent will have to be aware in this context of the fact that once he operates abroad, he will in principle fall within the jurisdiction of a foreign state, and will have to take into account the rules applicable to him as well in this country, rules that may strongly differ from the Dutch rules. Furthermore, if he has the Dutch nationality, he will be bound by Dutch criminal law in so far as this is also applicable to Dutch nationals abroad under article 5 of the Dutch Criminal Code.

The WIV 2002 does not contain any specific rules on the deployment and actions of informers and agents abroad. However, the basic starting points of the Act and the principles on which the Act is based should apply as much as possible to operations and situations abroad. For example, also regarding the deployment of informers and agents abroad the special duty of care of the management of the service, described in article 15 of the WIV 2002, will remain applicable. This duty of care includes for example the safety of persons with whose cooperation information is collected, while their recruitment as informer or agent takes place in accordance with the rules applicable in the Netherlands. As far as collecting information abroad is concerned, the principles of necessity, proportionality and subsidiarity shall also apply.

## 5.3 *More detailed elaboration by the MIVD*



Because already before the coming into effect of the WIV in 2002 a major part of the MIVD's duties were focused on collecting and processing information abroad, unlike in the case of the AIVD no need was felt to set up a separate international directorate. For this same reason the MIVD has refrained from a more detailed elaboration of specific rules as to the deployment of informers and agents abroad. Apparently, the general internal regulations referred to above are deemed sufficient. The Committee has some sympathy for this view, but nevertheless considers it desirable that this subject and the resulting modalities for intelligence activities receive more attention in the service's internal regulations.

#### 5.4 *Cooperation between the MIVD and the AIVD*

Because the Designation order adopted by the Prime Minister is applicable to both the MIVD and the AIVD, a certain degree of coordination of activities between the two services is necessary. This applies not only to the division of countries and subjects referred to in (the secret appendix to) the Designation order, but also the use that is made of the intelligence gathered. This way, it is possible in mutual consultation to arrive at a more effective deployment of funds, but also to prevent mutually inconsistent reports. A covenant concluded on 8 July 2005 provides for the present cooperation between the two services.<sup>17</sup>

In order to prevent the services from deploying the same sources and/or agents without the services being aware of this, the MIVD and the AIVD are to consult with one another at regular intervals. A consequence of this so-called *look-up* arrangement is that it has been agreed that the services will consult with one another on the deployment of potential sources.

### 6. **The deployment of informers and agents abroad in practice**

#### 6.1 *Introduction*

The investigation into the deployment of informers and agents abroad in practice consisted of inspection of files and interviews with employees of the service. The investigation was not limited to the deployment of *Dutch* informers and agents abroad, but also focused on the deployment abroad of (foreign) informers and agents from the region itself. The Committee found that the operations investigated fitted within the statutory tasks of the MIVD as described in article 7, second paragraph, sub a, c and e, WIV 2002.

#### 6.2 *Informers and agents*

##### 6.2.1 *Subsources and contact persons*

Under article 3, fourth paragraph, under a, sub 1, of the Defence Mandate Regulation giving a mandate to the Director of the MIVD is precluded if the permission for exercising the power of article 21 WIV 2002 is given for the first time in the case in question. This means that the Minister's permission is required for the initial deployment of an agent. In order to assess whether a person is sufficiently reliable and susceptible to steering to be deployed as an agent, the MIVD makes use of the Humint Recruitment Cycle.<sup>18</sup> Only once this cycle has

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<sup>17</sup> *Parliamentary Documents II* 2004/05, 30 070, no. 6 (appendix).

<sup>18</sup> See the letter of the Minister of Defence of 3 October 2005, *Parliamentary Documents II* 2005/06, 29 924, no. 4.

been completed, is it possible to request the Minister for permission to deploy the person as an agent. In principle this procedure meets the legislator's intentions, which consider reliability as a general requirement that should apply to all agents.<sup>19</sup>

However, in practice the procedure followed by the MIVD poses problems. Within the context of one of the operations the MIVD made intensive use of an agent's extensive network. In a number of cases the MIVD, in the absence of the agent but with his permission, maintained direct contact with persons from this network. These persons were given instructions by the MIVD in the sense of article 21, first paragraph lid, under a, WIV 2002. In spite of this, in these cases the Minister was not requested to give permission for the deployment of agents. The MIVD states that the situation in the country in question was such that it was not possible to assess the reliability and susceptibility to steering of the relevant persons; incidentally, a viewpoint the Committee can subscribe to. According to the MIVD the Minister could not be requested to take responsibility for a person whom the MIVD could not vouch for. Consequently, the MIVD designated these contacts as subsources or contact persons, qualifications that have no legal status.

The qualification subsource, incidentally, is used in the procedural instructions, where the subsource is described as a source's interlocutor who usually is unaware that his information is being passed on by the source.<sup>20</sup> It will be clear that this refers to a different category than the persons with whom the MIVD further maintains contact without the agent being involved. This term does not allow an interpretation that also covers persons who are steered by the operator in the source's presence. In the Committee's opinion the MIVD does not act in accordance with the statutory requirements when the service designated such persons as contact persons only and not as agents. Neither are informers involved in this context, because the persons referred to are clearly steered by the service and therefore operate under the instruction of article 21, first paragraph, under a, WIV 2002.

Although the MIVD meets its obligation to ensure that the reliability of its agents is assessed, nevertheless the MIVD's procedure described above is not in accordance with the legislator's intentions. It was the legislator's intention, after all, to have persons approached by the service fall either under article 21 WIV 2002 or under article 17 WIV 2002. According to the Act in those cases in which the service actively steers persons this involves an agent in the sense of article 21 WIV 2002. The deployment of such a person takes place under the responsibility and instruction of the service and therefore under ministerial responsibility.<sup>21</sup>

#### 6.2.2 An agent without ministerial responsibility

With respect to one of the informers of the MIVD the Minister of Defence refused to give his permission for the deployment of this person as an agent due to the more than limited risk factor. The Minister's refusal obliged the MIVD to break off all preparations in connection with the actual deployment of the potential agent. However, contact with the person involved was maintained after the ministerial decision. After some time the contact with this person became more intensive and at a certain point the service was even steering the person involved, for example by providing video equipment for making video recordings. In the Committee's opinion as from that moment the person involved should be designated as an

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<sup>19</sup> *Parliamentary Documents II* 1999/00, 25 877, no. 8, p. 58.

<sup>20</sup> The Committee does not consider this definition from the Humint Procedural Instructions entirely adequate. The Committee's findings show that in many cases the subsource is very much aware that the information is passed on by the source.

<sup>21</sup> *Parliamentary Documents II* 2000/01, 25 877, no. 14, p. 42.

agent. Therefore the procedure followed by the MIVD in this instance cannot be considered to be in accordance with the Minister's decision and is also in conflict with the law.

The Committee observes that the above case is connected with the way in which the MIVD uses its own definition of the term 'informer', which conflicts with article 17 in conjunction with article 21 WIV 2002. The suggestion that an informer to some extent can be steered – the 'active informer' from the service's internal regulations – may result in a person being maintained as an informer for a longer period than is legally permitted. This practice is moreover promoted by the strict requirements the MIVD sets to the reliability of an agent; the service only considers a person as an agent once his reliability has been established. The Committee in principle considers this approach towards the reliability of agents commendable, however, in practice it sometimes results in a situation in which the MIVD within the context of the preliminary trajectory of the Humint Recruitment Cycle has effectively deployed a person as an agent before the Minister has been requested to give his permission.

Incidentally, the above case is not the only one in which the MIVD's approach conflicts with statutory terms from the WIV 2002. With regard to several operations the Committee has established that persons had been active as agents for the MIVD before the Minister had been requested to give his permission. Although the Committee understands that it will not always (especially abroad) be possible to perfectly gear the actual deployment and the permission obtained to one another, the Committee wishes to remind the MIVD that the law does not permit the deployment of agents without prior permission. The Committee therefore considers these cases to conflict with the WIV 2002.

As mentioned earlier in this chapter, article 3, fourth paragraph, under a, sub 1, of the Defence Mandate Regulation places the level of permission for the initial deployment of an agent with the Minister of Defence. In so doing, the MIVD opts for a higher level of permission than the AIVD, which places the request for the initial deployment of an agent with the director (being the head of the department). The Committee finds that in combination with the definition the MIVD uses for the statutory term 'agent', this causes problems with respect to agents abroad, whose reliability is, after all, difficult to assess. The threshold for requesting the deployment of an agent, in particular regarding operations abroad, is considerably higher for the MIVD than for the AIVD. If one has to wait with a request for permission until the reliability has been established, it will often already be too late: the agent will then already have performed activities in the capacity of an agent. Also in the case referred to above, in which the preparations for the operation were already in an advanced stage, the person involved was effectively active for the MIVD as an agent.

The Committee recommends that the MIVD bring its internal regulations regarding the reporting of a person as an 'agent' in line with the requirements of article 21 of the WIV 2002. In the Committee's view these internal regulations should be amended in such a way that the MIVD will in future submit a request for permission regarding the deployment of an agent to the Minister at an earlier point. One option that could be considered is giving a broader mandate to the service, as is already the case with the AIVD, possibly with specific conditions attached, in which context the requirements used by the MIVD to designate a person an 'agent' should be reviewed.

### 6.3 *Requesting permission*

In situations in which the initial permission for the deployment of an agent is given by the Minister, the signature of the director of the service is sufficient for the subsequent permission for an extension of the deployment. The Committee has found that the MIVD – apart from some problems in connection with the introduction of the WIV 2002 that continued until the end of 2003 – in obtaining this permission for an extension of the power of article 21 WIV 2002, remained within the period of three months.

The Committee also considers the accompanying explanation, although rather concise with respect to the extension of the use of the power, sufficiently clear. On this point the Committee wishes to emphasise the importance of a new substantiation for each request for an extension of the power. This way the service at a strategic level will have a good picture of the results of the operation over the previous period.

To conclude, the Committee observes that in several cases the MIVD has made use of a so-called collective request: in one request permission is asked for the deployment of several agents. The Committee has already expressed its disapproval of this in a previous supervisory report.<sup>22</sup> It therefore confines itself to observing that nowadays the MIVD, apart from the occasional exception, no longer makes use of collective requests.

The Committee considers it desirable that the MIVD as much as possible requests permission for each agent separately. This way the service is forced to state its grounds for the desirability of deploying an agent for each agent separately. The Committee considers it of great importance that the deployment of each agent is judged on its own merits, separately from any other agents.

## 6.4 *Deployment*

### 6.4.1 Development stage and break-off stage of a contact

As indicated in the internal regulations of the Humint Department no two development stages (the ‘approach’) regarding a contact are the same. Therefore it is not possible to give comprehensive rules in this context, and only several basic rules have been formulated.

From the files examined the Committee infers that the MIVD complies with the Humint Procedural Instructions. The approach interview is always preceded by thorough preparations. In those cases in which the MIVD has reason to assume that additional security measures are required for the agent or informer and operator, it ensures that such measures are indeed taken.

The Humint Procedural Instructions describe the importance of a thorough break-off of the service’s relation with the agent or informer. After all, during the operation a relationship based on trust has been built up with the agent or informer. It is to be avoided that the agent or informer feels abandoned. Attention is to be paid to timing, due care, decreasing remuneration, clarity and possibly psychological aftercare. The files examined show that the MIVD pays sufficient attention to the various aspects involved in breaking off the relationship. The Committee therefore is of the opinion that the break-off stage is handled with due care.

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<sup>22</sup> Supervisory Report no. 5A concerning the investigation of the Supervisory Committee into the legitimacy of the MIVD investigation into the proliferation of weapons of mass destruction and their means of delivery, 13 October 2005, p. 8. See [www.ctivd.nl](http://www.ctivd.nl).

#### 6.4.2 Instructions and reporting

The Committee has found that the MIVD within the context of the agent operations abroad has met the requirement of article 21, sixth paragraph, WIV 2002. The instructions given to the agents in the specific operations are described by the operator in question in the file.

However, the Committee observes that the quality of the representation of the instruction differs from operation to operation due to this method of reporting. Sometimes the instructions are laid down in great detail, at other times there are only instructions in outline. In the latter case it is difficult to assess the quality of the instructions, not only for the Committee but also for the MIVD itself. The Committee is of the opinion that more uniformity should be applied in the method of reporting. The Committee therefore recommends that the MIVD develop internal guidelines on this subject.

#### 6.4.3 Remuneration

With respect to the remuneration of agents the Committee observes that it is difficult to make general statements on this subject, because the motives which drive agents may be very different. Both idealistic and materialistic considerations may be involved. Occasionally an agent is paid a more or less fixed amount for a certain period of time. These cases always involve intensive operations that require a lot of time and effort from the agent. However, in most cases expense allowances are used.

#### 6.4.4 Safety

Under article 15, under c, WIV 2002 the Director of the MIVD (being the head of the service) is responsible for the safety of the persons with whose cooperation information is gathered. The above article expresses the duty of care that is placed on the service and is further worked out in the Humint Procedural Instructions. A consequence of this is that the service is to pay attention to the agent or informer's safety awareness, and to take into account his private situation. The Committee finds that the MIVD meets the duty of care laid down in article 15, under c, WIV 2002.

It has come to the Committee's attention that the MIVD no longer considers observing a meeting between an employee of the service and an informer or agent as a special power in the sense of article 20, first paragraph, of the WIV 2002 if the informer or agent in question has been informed of the observation in advance. The service is of the opinion that the power to perform such an observation arises from the general statutory tasks of the service as laid down in article 7 of the WIV 2002. The MIVD argues that by informing the informer or agent in question it is no longer possible to speak of a power that involves a (major) invasion of personal privacy.

The Committee does not share this view. By analogy with what the Committee observed earlier in a supervisory report with respect to the AIVD<sup>23</sup> the Committee states that as far as

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<sup>23</sup> Supervisory Report no. 4 of the Supervisory Committee concerning an investigation into developments within the Moluccan community of 26 January 2005, Annual Report CTIVD 2004-2005, p. 57. See [www.ctivd.nl](http://www.ctivd.nl). In its accompanying letter of 22 March 2005 to the Lower House the Minister of the Interior and Kingdom Relations indicated that he would accept the Committee's recommendations on this point. *Parliamentary Documents II* 2004/05, 29 924, no. 2.

an observation is concerned, purely from a security perspective of a meeting between an employee of the service and an informer or agent an explicit statutory basis is lacking.<sup>24</sup> It would be defensible to condone, by analogy with criminal law, non-systematic observation by the MIVD as being a (minor) invasion of civilians' personal privacy. This would mean that it would only be necessary to request permission in case of systematic forms of observation. Limited invasions of personal privacy can then be based on the general statutory tasks of the MIVD (article 7, second paragraph, WIV 2002), possibly in combination with the duty of care of article 15, under c, of the WIV 2002. The Committee considers in this context that decisive should be not whether or not the informer or agent in question has been informed, but the intrusiveness of the observation. As to the question when do we speak of systematic observation, we refer to the criteria formulated in criminal law, i.e.: the duration of the observation, the location, the intensity, the frequency or the use of a technical aid that offers more than mere amplification of the senses.

The Committee recommends that the MIVD further work out the difference between systematic and non-systematic observation as described above by the Committee in the service's internal regulations.

#### 6.4.5 Criminal offences

The Committee's investigation has shown that the agents of the MIVD do not make use of the statutory possibility to commit, under certain circumstances, criminal offences that constitute a violation of the Dutch legal order based on article 5 of the Dutch Criminal Code.

The question could arise whether activities abroad possibly related to espionage could be considered criminal offences in the sense of article 21, third paragraph, of the WIV 2002. The Committee concludes that these activities cannot be considered in this way. It can be considered a given that espionage constitutes a violation of the criminal law in which it takes place. However, Dutch criminal law is not applicable to activities abroad related to espionage, in so far as the espionage in question does not pertain to Dutch state secrets and violation of the interests of the Dutch state. Article 5, paragraph 1, sub 2, of the Criminal Code after all requires the principle that an act must be a punishable offence in both countries. Dutch criminal law is applicable only if the act in question constitutes a criminal offence in our country, whereas it has been made punishable in the country where it has been committed. The criminal offences against the security of the state (referred to in title I of Book II of the Criminal Code), which include espionage, however, contain components of a typically national nature. These components pertain exclusively to espionage aimed against the Dutch state. Therefore the requirement that an act must be a punishable offence in both countries is not met.<sup>25</sup>

#### 6.5 *Necessity, proportionality and subsidiarity*

According to article 18 WIV 2002 the power laid down in article 21 WIV 2002 may only be exercised in so far as this is necessary for the proper execution of the tasks referred to in article 7, second paragraph, under a, c and e, of the WIV 2002. As indicated above, the deployment of agents takes place within the context of the statutory tasks laid down in

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<sup>24</sup> The MIVD's security task (article 6, second paragraph, under d, WIV 2002) is not mentioned in article 18 of the WIV 2002, which means that the MIVD is not permitted to make use of special powers within the context of this task.

<sup>25</sup> See for a detailed description of the doctrine of the principle that an act must be a punishable offence in both countries C.P.M. Cleiren & J.F. Nijboer, *Strafrecht. Tekst & commentaar*, Deventer: Kluwer 2004, p. 18-23.

article 7, second paragraph, under a and e, of the WIV 2002. It has become clear to the Committee that the deployment of agents abroad by the MIVD takes place in accordance with the requirement of necessity.

Under article 31, fourth paragraph, WIV 2002 exercising a power should be proportionate to the objective involved in exercising it. From the operations examined it is apparent that the intensity of gathering intelligence through informers and agents forces the service to exercise due care with respect to the existing manpower and resources. A consequence of this is that the actual operations involving agents primarily take place in those geographical areas where the Netherlands has an immediate military involvement. In other areas the activities involve agents or informers who primarily collect strategic information and who may be used more intensively if political developments so dictate. Within the context of foreign operations the other special powers are only used to a limited extent. Our investigation did not show that these powers were exercised, or that article 21 WIV 2002 was used in a disproportionate way to the intended objective. The Committee therefore finds that the operations examined meet the requirement of proportionality.

When it is possible to choose between various powers, the service has the obligation to choose for the power that is least detrimental to the person involved, according to article 31, second paragraph, WIV 2002. This requirement of subsidiarity may be read in conjunction with the first paragraph of the same article, which states that a special power may only be used if the gathering of intelligence intended in this context cannot take place, or cannot take place in time, by consulting open sources. The operations examined show that the type of intelligence that the MIVD gathers by means of agents and informers abroad, cannot be obtained by using open sources. The combination of the deployment of agents and the undirected monitoring and recording of non-cable telecommunication in the sense of article 27 WIV 2002 provides a considerable added value. The agents visit places and speak to people inaccessible via open sources. In the Committee's opinion the operations of the MIVD meet the requirement of subsidiarity.

## 6.6 *Cooperation*

### 6.6.1 Cooperation with the AIVD

Pursuant to article 58, first paragraph, WIV 2002 there is a statutory obligation for both services to cooperate with one another as much as possible. This cooperation consists at any rate of providing information and technical and other forms of support within the context of using special powers as referred to in section 3.2.2 of the Act.

A special form of cooperation takes place within the context of the foreign intelligence task. In addition to the 'Designation of Subjects Act on the Intelligence and Security Services 2002' referred to above, which refers to both services, a more detailed elaboration according to aspects, countries and regions has been laid down in a secret annex, which is geared to each service separately, taking into account joint operational aspects, such as for example international counter-terrorism. Moreover, agreements have been made on the focus areas included in the Prime Minister's 'Designation' in order to ensure effective coordination between the services.

The Committee finds that the cooperation between the MIVD and the AIVD in the area of foreign intelligence task in general is satisfactory. Within the context of the cooperation

between the Humint Department and the AIVD there is frequent consultation. Furthermore, the MIVD provides insight into its daily activities by sending its daily reports to the AIVD.

Precisely because within the context of the foreign intelligence task the services can easily be at cross-purposes, continual consultation and coordination of actions is necessary. The covenant on cooperation concluded on 8 July 2005<sup>26</sup> between the two services may prove to be of great use in this context.

#### 6.6.2 Cooperation with foreign services

In several operations there is cooperation with a foreign intelligence and security service. The cooperation with foreign services is provided for in article 59 WIV 2002. Two forms of cooperation are described in this article, both on behalf of the interests entrusted to the foreign services: providing information (article 59, second paragraph, WIV 2002) and providing technical and other forms of support (article 59, fourth paragraph, WIV 2002). Both forms of cooperation are subject to the condition that the interests of the foreign service may not be incompatible with the interests entrusted to the Dutch services<sup>27</sup> and that the Dutch service's proper performance of its tasks does not dictate otherwise.

As regards steering an agent abroad in cooperation with a foreign service, this may include both of the above forms of cooperation. For example, in case of such operations the MIVD spontaneously exchanges intelligence with the foreign service. It also regularly happens that the MIVD operator together with a foreign colleague speaks with the agent. The latter form of cooperation can be understood as support in the sense of article 59, fourth paragraph, WIV 2002. The Committee's investigation has shown that the cooperation with foreign services meets the statutory requirements of article 59, second paragraph, under a and b, and fourth paragraph, under a and b, of the WIV 2002.

### 7. Conclusions and recommendations

- 7.1 The Committee is of the opinion that employees of the MIVD, except in certain special cases, do not have to be reported as agents in connection with the procedure laid down in article 21. The Committee is of the opinion that the Act has not been drawn up or intended to cover such cases.
- 7.2 The Committee considers it useful that the MIVD and the AIVD compare the internal codes of conduct of the services as to the development phase of contact ('approach') and deployment of informers and agents, in order to see if anything can be learnt from such a comparison.
- 7.3 The Committee considers it desirable that the MIVD works out more specific rules with respect to the deployment of informers and agents abroad.
- 7.4 The Committee finds that the operations on foreign soil examined fitted within the tasks of the MIVD.

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<sup>26</sup> *Parliamentary Documents II* 2004/05, 30 070, no. 6 (appendix).

<sup>27</sup> Whether this is at issue, is partly assessed on the basis of Dutch foreign policy, including in the area of human rights. *Parliamentary Documents II* 1997/98, 25 877, no. 3, p. 74 (Explanatory memorandum to the Act).



- 7.5 The Committee finds that in several cases the MIVD has made use of persons who were effectively active as agents, whereas the service had not yet received permission for this from the Minister. The Committee considers the cause of this to lie in the definition of informers and agents used within the MIVD, which is not in accordance with the WIV 2002. The Committee recommends that the MIVD bring its internal regulations on this point in line with the statutory requirements, in such a way that the MIVD will in future submit a request for permission to the Minister at an earlier point. One option that could be considered is giving a broader mandate to the service, as is already the case with the AIVD, possibly attached to specific conditions, in which context the requirements used by the MIVD to designate a person an 'agent' should be reviewed.
- 7.6 The Committee finds that notwithstanding the above the MIVD in general stays within the statutory periods. The Committee also considers the accompanying explanation sufficiently clear. However, the Committee does consider it desirable that the MIVD as much as possible request separate permission from the Minister for the deployment of each agent instead of making use of so-called collective requests.
- 7.7 The Committee finds that the MIVD meets its obligation to lay down in writing its instructions to an agent. Within the context of clarity and completeness the Committee recommends that the MIVD develop internal guidelines on this subject.
- 7.8 The Committee finds that the MIVD meets its obligation of due care in respect of the informers and agents deployed or called in by the service.
- 7.9 The Committee recommends that the MIVD work out the distinction between systematic and non-systematic observation as indicated by the Committee in the service's internal regulations.
- 7.10 The Committee finds that the break-off stage of the contacts with agents of the MIVD takes place in a sufficiently careful way.
- 7.11 The operations on foreign soil examined by the Committee show that the agents of the MIVD do not make use of the statutory possibility under certain circumstances to commit criminal offences that constitute a violation of the Dutch legal order.
- 7.12 The Committee establishes that the cooperation with the AIVD in carrying out the so-called foreign intelligence task of both services in general is satisfactory.
- 7.13 The Committee establishes that the cooperation with the foreign intelligence and security services meets the requirements of the WIV 2002.

Thus adopted at the meeting of the Committee of 12 April 2006