

SUPERVISORY COMMITTEE
ON
THE INTELLIGENCE AND SECURITY SERVICES

CTIVD no. 8b

SUPERVISORY REPORT

**On the Supervisory Committee's investigation into the deployment by the AIVD
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 AIVD (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 MIVD (General Intelligence and Security Service). A separate supervisory report will be published in response to this investigation at the MIVD. On 9 May 2005 the Committee in accordance with article 78, third paragraph, WIV 2002, informed the Minister of the Interior and Kingdom Relations and the Minister of Defence, and the Chairman of the Upper House and the Chairman of the Lower 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 AIVD is permitted to carry out intelligence activities abroad in the interests of national security. Article 6, second paragraph, under d, of the WIV 2002 refers to the following as a task of the AIVD (the so-called *d*-task): conducting investigations with respect to other countries regarding subjects which have been designated as such by the Prime Minister, also the Minister of General Affairs in accordance with the Minister of the Interior and Kingdom Relations and the Minister of Defence in the 'Designation of Subjects Act on the Intelligence and Security Services 2002' order as adopted on an annual basis.¹ The following subjects were designated in the latest version of the 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.

¹ The most recent order dates from 29 November 2005, *Government Gazette (Stcrt.)* 20 January 2006, no. 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.

It is also possible to deploy informers and agents abroad based on the a-task.² The Committee's investigation is limited to the d-task.

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 AIVD 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 AIVD (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).

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.³ Incidentally, approaching informers comes under article 17, first paragraph, sub a. The deployment of agents comes under article 21, first paragraph, under a, sub 1 and 2. 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 responsibility and instructions 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.⁴ 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.⁵ 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.

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 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 AIVD 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

² See article 6, second paragraph, under *a*, of the WIV 2002 which (briefly put) describes the AIVD's task as: conducting investigations into persons and organisations who or that give rise to the serious suspicion that they pose a danger to the democratic legal system or to the security or other vital interests of the state. These special powers may not be deployed for the (security and protective) tasks described in this article under *b* en *c*.

³ *Parliamentary Documents II 1997/98*, 25 877, no. 3, p. 31. (Explanatory memorandum to the Act)

⁴ 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.

⁵ *Parliamentary Documents II 1997/98*, 25 877, no. 3, p. 31 (Explanatory memorandum to the Act).

circumstance that in case of an informer no special power is involved; this is different when an agent is deployed. However, in practice the AIVD also in deploying informers *the first time* (thus not in case of an extension) uses the requirement of permission in order to have a proper overview of all the human sources active on behalf of the service.⁶ The permission for deployment of an agent is granted in accordance with article 19 of the WIV 2002 for a maximum period of 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.⁷

The permission is given by the Minister of the Interior and Kingdom Relations, but can be mandated to the management of the service, which in turn can sub-mandate it. In accordance with article 4, first paragraph, of the Mandate Regulation AIVD 2002, the mandate for the deployment of an agent for the first time is exercised by the director, thus the head of the directorate in question only. In case of an extension (and when an informer is approached for the first time) it is usually the team head who grants permission. Incidentally, in deploying the certain categories of persons as an agent, depending on the social function or position of the person involved, the permission is reserved for the Minister or the head of the AIVD.

Both the informer and the agent maintain contact with the service through an employee of the service, the *operator* or *acquisition officer* who is subordinate to the head of the team to which he has been assigned. In the case of the AIVD the contact may also be made and maintained, under the responsibility and steering of the service, by an officer of the Regional Criminal Intelligence Service (RID) of the police. The intensity of the contact between the operator and agent of course strongly depends on the actual situation. 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 reported 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.⁸ 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.

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

⁶ The requirement of permission does not apply to informers who are approached within the context of a security clearance investigation with respect to the b-task.

⁷ Supervisory report CTIVD no. 7.

⁸ *Official Reports I* 2001/02, p. 18-943.

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.⁹

An agent's primary task is gathering intelligence; in addition to this he may be entrusted with promoting or taking measures in connection with interests entrusted to a service. This entails the possibility of an agent actually acting for example to prevent a person or an organisation, on whom or which he is gathering intelligence, from committing criminal offences. In a letter to the Chairman of the Lower House of 15 July 2004¹⁰ the Minister of the Interior and Kingdom Relations announced that the possibilities to disrupt the preparations of terrorist attacks (apart from warning the competent authorities on time) will be extended, enabling the services to act themselves and not only the agents deployed by the services. The Administrative Evaluation Committee AIVD (the Havermans committee) in its report entitled 'The AIVD in transition', which was published in November 2004, also made a suggestion to this effect (pp. 127, 225 and 234). It goes without saying that the triple requirement applicable to every action; necessity, proportionality and subsidiarity, in exercising such a power to take disruptive measures will always have to be taken into account by the service itself.

Under article 21, third and fifth paragraph, of the WIV 2002 the agent himself can also under strict conditions, set by the service, commit criminal offences or render assistance in third parties committing criminal offences. In this context we refer to the Committee's supervisory report on the legitimacy of a counter-terrorism operation by the AIVD.¹¹

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 AIVD of the statutory regulation of the deployment of informers and agents in general

The AIVD Handbook contains a number of descriptions of procedures which need to be followed in exercising the special powers referred to in the WIV 2002. The procedures described also include a procedure for the 'deployment of a person for collecting specific information under instruction'. The person thus deployed according to the Handbook is by definition to be regarded as an agent of the AIVD. Any proposals for assuming an identity or capacity that may serve as a cover for an agent, go through a separate procedure. The Handbook does not contain any general codes of conduct or instructions for performing intelligence activities and tasks. The head of the AIVD did however adopt a detailed code of

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

¹⁰ *Parliamentary Documents II*, 2003/04, 29 200 VII, no. 61, p. 2.

¹¹ Supervisory report CTIVD no. 7.

conduct for acquisition activities in 2004. This code of conduct is not without obligation and can therefore be used by the Committee as an assessment criterion.

Generally the Committee agrees with this code of conduct, which contains many useful instructions and practical tips. The Committee does however insist, in order to ensure the greatest topicality, to keep the code up to date by regularly incorporating in it recent experiences and working methods. Furthermore, 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. In any new edition more consideration should preferably be given to the ethical standards which are to apply in the deployment of informers and agents than is now the case.

In the report on the AIVD's investigation into radicalisation processes within the Islamic community the Committee has established that in practice the line between informers and agents is quite thin.¹² The Committee repeated this finding in its supervisory report in the AIVD's investigation into developments within the Moluccan community in the Netherlands.¹³ As already indicated under section 3, the AIVD when approaching a source, even if this person will only be an informer, always employs the requirement of permission, invoking article 21 WIV 2002. When a natural person is approached it is often still unclear what the nature of the contact will be. After the phase of the initial approach there will be one of two separate trajectories: one trajectory for the informer (article 17 EIV 2002), in the context of which the initially requested permission prior to his (possible) deployment as agent is not repeated after three months, and one for the agent (article 21 WIV 2002). In case of agents there is therefore a three-monthly assessment; in case of informers the AIVD periodically performs an internal assessment on the efficiency of their deployment. In practice it is not unusual for an informer to start developing other activities (at the request of the service) in the course of the contact and thus to acquire the status of agent. If this happens, an instruction will also need to be established.

The answer to the question when a source is to be regarded as an agent therefore depends on the degree of steering. Although in the phase of the first approach the AIVD, as explained above, does more than statutorily required (for under the WIV 2002 no permission is needed for the deployment of agents), in its report on the AIVD's investigation into developments within the Moluccan community the Committee was of the opinion that the service in the subsequent trajectory continued to consider a number of sources as informers for too long, while these sources – in view of the degree of steering – should have been regarded as agents.¹⁴ The circumstance that informers are not granted the status of agent on time is partly a consequence of the fact that informers are not assessed every three months. As a result it is often unclear at what moment the informer phase has passed. Neither is it clear what degree of steering constitutes steering in the meaning of the WIV 2002 or the explanatory memorandum to the Act. The moment a source is stimulated to maintain and extend his contacts this is to be regarded as steering. The mere request to an agent to keep his eyes open and report on this findings, in the Committee's view does not constitute steering. A sliding scale is involved in this context. The Committee has established that it is not always clear where precisely on this scale one finds oneself. Furthermore, it has established that the permission for deploying agents is often renewed in cases in which the AIVD has no intention of contacting the agent within the foreseeable future.

¹² Supervisory report CTIVD, no. 2, annual report 2004/05, p. 41; see also www.ctivd.nl

¹³ Supervisory report CTIVD, no. 4, annual report 2004/05, p. 55; see also www.ctivd.nl

¹⁴ Supervisory report CTIVD, no. 4, annual report 2004/05, p. 56; see also www.ctivd.nl

As he announced to the Chairman of the Lower House in his response to the latter report on 22 March 2005, that latter observation was cause for the Minister of the Interior and Kingdom Relations in principle to have the permission for deploying an agent terminated, if the AIVD has no intention of deploying the agent within the foreseeable future.¹⁵

In the same response the Minister promised to also have investigated if it was possible to establish a more detailed guideline for the deployment of agents. At the moment of preparing this report such a guideline had not yet been finalised.

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. 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?¹⁶ The ministerial memorandum in response to the more detailed 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 may not be created as yet by operating abroad and in cooperation with foreign colleagues.’¹⁷

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

¹⁵ *Parliamentary Documents II*, 2004/05, 29 924, no. 2.

¹⁶ *Parliamentary Documents II* 2000/01, 25 877, no. 58, p. 4, 8-9, 21 and 27.

¹⁷ *Parliamentary Documents II* 2000/01, 25 877, no. 14, p. 21.

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.'¹⁸

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.'¹⁹

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.'²⁰

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 6, second paragraph, under d, of the WIV 2002 instructs the AIVD to conduct investigations regarding other countries as to subjects adopted 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 6, 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 *d*-task, says, among other things, that it 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 *d*-task focuses on gathering intelligence on other countries that enables the AIVD to recognise latent threats to national security at an earlier

¹⁸ *Parliamentary Documents II*, 2000/01, 25 877, no. 59, p. 10.

¹⁹ *Parliamentary Documents II* 2000/01, 25 877, no. 59, p. 10.

²⁰ *Parliamentary Documents II*, 2000/01, 25 877, no. 59, p. 10.

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.

An important aspect of the WIV 2002 was that for the first time the security task of the Dutch secret service was combined with an independent (foreign) intelligence task. In most European countries the intelligence and security task is still assigned to separate organisations. This was also the situation in the Netherlands until 1994. In that year the Foreign Intelligence Service residing under the Prime Minister and the Ministry of General Affairs was abolished. Part of the field of activity of this service, namely the part already included in the tasks assigned to the then National Security Service (BVD), was transferred to the latter service. The intelligence task as performed by the Foreign Intelligence Service (IDB), was only introduced for the AIVD in the new WIV 2002, namely in article 6, second paragraph, under d, after which the logical step was to rename the BVD into the General Intelligence and Security Service (AIVD).

As is the case for the so-called *a*-task of the service, in performing the *d*-task the special powers assigned to the AIVD by law, as described in more detail in section 3.2.2. (articles 18-33) of the WIV 2002, may be used. The basic rule is that a special power may only be used for a specific purpose. A telephone tap for example may only be worked out for the purpose for which it has been installed. Any infringements on the protection of the personal privacy and other rights of citizens, according to the European Convention on Human Rights, are only permitted in so far as the law has been complied with and the infringement is necessary in a democratic society in the interest of national security and/or public safety. This implies that the information obtained in exercising a special power is not used for other purposes unless this use in itself meets the requirements under the European Convention. Under this restriction information obtained in the context of the *a*-task may be used for exercising the *d*-task, and vice versa. The circumstance that the content of the *a*-task is more limited than the *d*-task in itself does not make any difference. In both cases the *interest of national security* referred to in the preamble of article 6, second paragraph, is decisive. Always it is decisive whether the collecting of information has been performed in accordance with the law and the collecting and processing of information is necessary in the interest of national security. In this context the rules of thumb laid down explicitly in the WIV 2002, namely the requirements of proportionality and subsidiarity, have to be met.

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 the *d*-task abroad. 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 AIVD

As a consequence of the WIV 2002 the Foreign Intelligence Directorate was set up at the AIVD. However, as noted under 5.2, already before this time the AIVD (then still the BVD) was involved in operations abroad and in maintaining international contacts. The AIVD is aware that with regard to operations abroad the actions of the service's employees are to be prepared as carefully as possible on account of the legislation applicable there, which often differs from Dutch legislation, and to avoid any disruption of diplomatic relations. Therefore the head of the service must have given his prior permission (permission from the head of the team is insufficient). Under certain circumstances it may even be required to obtain the permission from the Minister of the Interior and Kingdom Relations. For the actions of an agent abroad who is not a staff member of the service, in principle the same rules and responsibilities apply as do for staff members of the service, albeit that permission for deployment is to be given by the director or the head of the team, respectively. It is pointed out explicitly that in case of operations abroad in the context of which either informers or agents are deployed or other special powers or means of intelligence are used, such as the installation of telephone taps and the observation of persons, to justify these actions the relevant Dutch legislation, in particular the WIV 2002, cannot be invoked towards the authorities or governments of the country involved. For this legislation is only applicable to Dutch territory. This leaves unimpaired the fact that in practice agents of a Dutch intelligence service operate abroad and in doing so make use of the powers and means of intelligence referred to in the WIV 2002. Where possible they will do so with the knowledge and if necessary the cooperation of the (friendly) counterpart service(s) of the country in question. It cannot be in this context, as already observed by Minister of the Interior and Kingdom Relations De Vries, in the discussions on the legislative proposal, that they are allowed to do more than permitted within their own national borders. Moreover, they always run the risk of coming into contact with the criminal legislation applicable locally abroad. In this context Dutch law is unable to protect them.

5.4 Cooperation between the AIVD and the MIVD

Because the Designation Order adopted by the Prime Minister is applicable to both the AIVD and the MIVD, a certain degree of coordination of activities between the two services is necessary in case of operations and activities abroad. This applies not only to the division of countries and subjects referred to in 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.²¹

²¹ *Parliamentary Documents II*, 2004/05, 30 070, no. 6.

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 an examination of the dossiers and interviews with employees of the service. In this context a restriction was made to operations falling under the responsibility of the Foreign Intelligence Directorate of the AIVD. Naturally also other directorates of the AIVD may be involved in foreign operations as a result of their activities, but this will often involve an incidental extension of an investigation that focuses on the Netherlands itself. In the operations investigated both informers and agents were used. Sometimes this involved approaching or using Dutch informers and agents abroad, but (foreign) sources originating from the region itself were also used. Often these operations built on the activities of other directorates within the service which after the realisation and entry into force of the WIV 2002 were taken over by the then formed Foreign Intelligence Directorate. The Committee has established that the operations investigated fit in with the tasks assigned to the AIVD, as described in article 6, second paragraph, under d, of the Act.

6.2 Using informers and agents

6.2.1 Requests for permission

The Foreign Intelligence Directorate (D4) was formed as such in 2002. The gradual filling and staffing of the positions took some time. D4 is therefore a comparatively new directorate. There were some start-up problems, partly as a result of the initial lack of sufficiently trained staff at the newly formed directorate. As a result in the initial phase between 2002 and 2005 the procedure with regard to the deployment of informers and agents was not always followed as it should be. In several cases for example the (three-monthly) permission for the deployment of agents was not granted retroactively or in time, the decision to prolong the deployment of agents was missing from the dossier or was lacking altogether. These shortcomings were acknowledged by the service. At the time of completion of the Committee's investigation, the above problems appeared to have been overcome. The deployment and renewal of the deployment of agents, in so far as the Committee has been able to establish, now takes place with due observance of the statutory provisions and within the margins set by the WIV 2002. The Committee is, however, of the opinion that the motivation of the requests for deployment of agents can sometimes be more extensive. Frequently in extending the deployment of agents no more than noncommittal standard motivations are given, whereas it would seem important that in particular in a request for renewal it is indicated once again why the extension is useful and necessary, considering the nature and contents of the information obtained from the agent in question. It is to be avoided that the renewal procedure – certainly when future renewals will cover longer periods than three months – becomes too much of a routine affair without the usefulness of the relation with a certain agent being weighed up against other priorities within or outside the team in question.

The Committee has established, with due observance of the above, that permission for the deployment of an agent and for the extension of this deployment by the officer declared competent to do so by law, has been granted.

6.2.2 Security and break-off stage

Essential for the deployment of an informer or agent is that the service can put sufficient trust in him. This calls for a sound preliminary investigation and careful interviews in which the informer or agent is approached. In addition, the security risks will also have to be considered seriously. In the Committee's opinion the security measures taken in the operations investigated by the Committee met the statutory duty of due care pursuant to article 15 WIV 2002 and the internal instructions based on this. In one case in which the agent insufficiently complied with the security agreements made the operation was broken off and the cooperation with the agent was terminated.

In particular in the especially dangerous countries where the Foreign Intelligence Directorate operates much attention will need to be given to the consideration of reliability and the taking of security measures. In some cases the conclusion could be drawn in retrospect that a source had been deployed as an informer or agent too quickly. In these cases the relationship with the service had to be broken off on account of the unreliability of the source. In another case a source became involved in dubious money transactions which had nothing to do with his intelligence work and which, warnings from the service notwithstanding, he continued.

In this context the question was raised whether a counter-observation performed by the service during or immediately preceding an encounter of an operator with an agent or informer in the interest of security (for example in order to establish if he is not being followed by third parties) is to be regarded as a special power as referred to in the articles 18-20 of the WIV 2002, for which permission is to be requested and obtained. In this context the Committee suffices by referring to the position taken in a previous supervisory report.²²

According to the service's internal guidelines terminating the relationship between the service and an agent requires is to take place with due care. In general the Foreign Intelligence Service does not readily proceed to a definitive termination of the relationship with an agent, because a 'dormant' agent may prove to be valuable after a certain period of time. Consequently decisions for renewal frequently have to be given without any immediate practical purpose being served. Of course a source with whom the service has terminated its relationship as an agent, can always be approached again later. This also has the advantage that an investigation into the reliability will takes place and that old and perhaps dated information will not be used.

6.2.3 Instructions and reporting

The Committee has established that in the context of the agent operations abroad the AIVD has met the requirement of article 21, sixth paragraph, WIV 2002. According to said article the instructions to the agent are to be recorded in writing. The reason for this recording is on

²² Supervisory report CTIVD no.4, annual report CTIVD 2004/05, p. 57; see also www.ctivd.nl. In his accompanying letter of 22 March 2005 to the Lower House the Minister of the Interior and Kingdom Relations stated to adopt the recommendations made by the Committee on this position. *Parliamentary Documents II*, 2004/05, 29 924, no.2.

the one hand the possibility of assessing the actions of the agents afterwards. On the other hand a written recording adds to clarity. The service has formulated internal rules for the recording of operations. A written report is made of all contacts with sources (the so-called operations report). This report comprises among other things the personal situation of the agent, financial aspects such as possible allowances, operational claims and the information provided by the agent. The Committee has established that the way of recording the instructions given varies in practice. For example, some operations reports contain communication plans and detailed reports of the first meeting with the agent and any agreements made. However, the Committee has also examined operations relating to which the instructions given were not sufficiently detailed or were missing in the operations report altogether. In so far as the Committee was able to properly assess any instructions of an operational nature and in connection with this the security aspects, the Committee has reached the conclusion that these were transparent and clear even if necessary were repeated or supplemented in time.

6.2.4 Remuneration

In general the remuneration of informers and agent was moderate. The service has consciously chosen this policy, because the service's position is that information should not be bought. The relationship with the service should as much as possible be based on trust rather than being prompted by material motives in which context the source gives his information to the service offering the most. The Committee has established that any payments to agents were laid down in the operations report and were not excessive. The Committee did not come across any large gifts relating to the operations investigated. Any small gifts were also reported in the operations report.

6.2.5 Criminal offences

The Committee has established that the agents deployed by the Foreign Intelligence Directorate have not committed any criminal offences under the instructions of the service in so far as via the articles 4 and 5 of the Criminal Code a link could be made between these criminal offences and the Dutch legal system. The question could be raised if any espionage-related activities abroad could be considered as criminal offences in the meaning of article 21, third paragraph, of the WIV 2002. The Committee has reached the conclusion that these activities cannot be regarded as such. It should be noted in this context that espionage-related activities can and often, of course, will constitute an infringement of the legal system of the country where these activities are performed. However, Dutch criminal legislation is not applicable to espionage-related activities abroad. For article 5, first paragraph, sub 2, of the Criminal Code contains the requirement of double punishability. Dutch criminal legislation only applies if the actions constitute a crime in our country while in the country where they were committed they have been made punishable. This is only different if state secrets relating to the allied powers as referred to in article 98, first paragraph, of the Criminal Code are involved, but the espionage activities instigated by the Dutch authorities most of the time will not be primarily aimed at this. The criminal offences against the security of the state (referred to in title I of Book two of the Criminal Code), which espionage is considered part of, however contain typical national elements. These elements only pertain to espionage aimed at the Dutch state. Therefore the requirement of double punishability is not met.²³

²³ See for a more elaborate description of the doctrine of the double punishability C.P.M. Cleiren and J.F. Nijboer, *Strafrecht, Tekst & Commentaar*, Deventer: Kluwer 2004, p. 18-23.

6.3 *Necessity, proportionality and subsidiarity*

The Committee has assessed the deployment of agents as referred to in article 21 WIV 2002 against the requirements of necessity, proportionality and subsidiarity, as described in the articles 18 and 31 of the WIV 2002. The Committee has reached the conclusion that as a rule these requirements have been met. However, the Committee does have a brief comment to make on the way in which a number of informers were approached. As was noted above (under 4), whether a source can be regarded as an agent strongly depends on the specific circumstances of the case. A criterion which can be used in making an assessment is the question whether the source develops certain activities on the instructions of the service which otherwise he would have abstained from doing. In a number of operations investigated by the Committee the source was regarded as an informer, whereas in fact there appeared to be steering. For example, a source was requested to occupy himself intensively with the so-called talent spotting. Within the service talent spotting is understood to mean: looking for potential contacts for the service. If the service asks an informer if he knows any people who are suitable and this informer subsequently mentions several names including any particulars he knows from his own experience, in the Committee's opinion this does not involve steering. However, as soon as the source goes a little further, for example by making enquiries with third parties for more information about potential candidates put forward by the service, in the Committee's opinion this does involve steering.

6.4 *Cooperation*

The Committee has opted not to discuss the cooperation between the AIVD and the Immigration and Naturalisation Service (IND) in this supervisory report, but in a separately to appear report that focuses on this subject.

6.4.1 *Cooperation with the MIVD*

Pursuant to article 58, first paragraph, WIV 2002, there is a statutory obligation between both services to provide as much cooperation as possible to one another. This cooperation involves at any rate the provision of information and rendering technical and other forms of support in 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 involves both services, there is a further elaboration as to aspects, countries and regions, laid down in a secret appendix, which is attuned to each service separately, with due observance of the common operational aspects, for example the fight against international terrorism. Moreover, for a proper coordination between the services agreements have been made concerning the areas of attention included in the Prime Minister's Designation Order.

The Committee has established that the cooperation between the AIVD and the MIVD in the area of the execution of the foreign task is generally satisfactory. In the context of the cooperation between D4 and the MIVD frequent consultation takes place with the MIVD's analysis department. Furthermore, the MIVD gives insight into the daily activities by sending its daily reports.

In particular because in the context of the foreign task the services can easily touch upon one another's tasks, continuous consultation and coordination of actions is necessary. The

covenant concluded between the two services on 8 July 2005 (see 5.4) on cooperation can be useful in this context.

6.4.2 Cooperation with foreign services

Cooperation between the AIVD and (friendly) foreign services (also referred to as counterpart or fellow services) takes place on the basis of article 59 WIV 2002. The cooperation consists of providing information to one another and offering technical and other forms of support. Cooperation does not take place if the interest to be promoted by the foreign service is inconsistent with the interests to be promoted by the AIVD or the interests of a proper performance of tasks dictates otherwise. Whether there are inconsistent interests is assessed among other things on the basis of the policy pursued by the Netherlands.²⁴ Furthermore, cooperation will also be abstained from if a proper performance of their tasks by the services opposes the granting of the form of support in question.

In general it is customary that the deployment in a certain country of an agent not belonging to the service employing the agent is reported to the intelligence service of the (friendly) nation of which the agent is a national. The AIVD, for example, if this service has deployed a foreign person as agent abroad, is to inform the relevant foreign intelligence service of this. The Committee is aware that considerations of an operational nature make that sometimes a foreign intelligence service is not informed of this.

7. Conclusions and recommendations

- 7.1 The Committee considers it useful that the AIVD and the MIVD 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.
- 7.2 The Committee finds that the operations on foreign soil examined fitted within the tasks of the AIVD.
- 7.3 The Committee has established that permission for the deployment of agents and the (three-monthly) extension of this deployment in case of foreign operations has not always been granted in time. The Committee points to the importance of a strict observance of the terms set to the exercise of special powers and, in so far as necessary, urges that these terms be carefully observed.
- 7.4 The Committee has established that the AIVD meets its duty of care in respect of the informers and agents deployed or called in by the AIVD.
- 7.5 The Committee has established that the break-off stage of the contacts with agents of the AIVD takes place with sufficient care.
- 7.6 The dossiers investigated by the Committee have shown that the agents of the AIVD do not use the possibility provided for by law under certain circumstances to commit criminal offences that infringe the Dutch legal system.

²⁴ *Parliamentary Documents II*, 1997/98, 25 877, no. 3, p. 74 (Explanatory Memorandum).

7.7 The Committee has established that the cooperation with the MIVD in performing the so-called foreign task of the two services is generally satisfactory.

7.8 The Committee has established that the cooperation with foreign intelligence and security services meets the requirements of the WIV 2002.

Thus adopted at the meeting of the Committee of 3 May 2006.