

SUPERVISORY COMMITTEE  
ON  
THE INTELLIGENCE AND SECURITY SERVICES

CTIVD no. 9a

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## SUPERVISORY REPORT

On the investigation by the Supervisory Committee into the official messages issued by  
the AIVD in the period from January 2004 – October 2005

### 1. Introduction

The investigation which the General Intelligence and Security Service (AIVD) performs pursuant to article 6, paragraph 2, Intelligence and Security Services Act 2002<sup>1</sup> essentially serves to timely warn the authorities responsible for possible threats to the vital interests referred to in the description of its tasks.<sup>2</sup> The power of the service to provide information externally has been explicitly included in section 3.3.2 of the WIV 2002. The data provided may be general in nature, but may also contain information on persons and organisations. If based on the data provided the recipient can take measures against the person or organisation to which the report pertains, the provision of information is done by way of an official message, a document that is suitable for publication. The Supervisory Committee on the Intelligence and Security Services (hereinafter: the Committee) has conducted an investigation into all official messages sent by the AIVD in the period from 1 January 2004 up to and including 1 October 2005. This investigation was announced by letter of 11 August 2005 in accordance with article 78, paragraph 3, WIV 2002, to the Minister of the Interior and Kingdom Relations (hereinafter: the Minister) and the chairmen of the Upper House and Lower House of the States General. A similar investigation has been conducted into the official messages issued by the Military Intelligence and Security Service. A separate supervisory report will be issued on this investigation (CTIVD no. 9b).

### 2. Investigation by the Committee

The key question in the Committee's investigation is whether the official messages have come about in accordance with the law and in an appropriate manner and with due care (article 12, paragraph 3, WIV 2002). To this end the Committee first investigated whether the contents of the official message were substantiated by the information present at the service. In so far as the underlying information was obtained by using a special power it has also been assessed whether in using the special power the statutory requirements were met, including the requirements of necessity (article 18 WIV 2002), proportionality and subsidiarity (article 31 and 32 WIV 2002). The Committee also assessed whether in the coming about of the official message the various statutory requirements for the external provision of data ensuing from the WIV 2002 were met. The AIVD's internal regulations were also investigated.

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<sup>1</sup> Hereinafter referred to as: WIV 2002.

<sup>2</sup> *Parliamentary Documents II* 1997/98, 25 877, no. 3 (explanatory memorandum to the legislative proposal WIV 2002), p. 55; *Parliamentary Documents II* 2003/04, 29 743, no. 3 (explanatory memorandum to the legislative proposal Witnesses Whose Identity Is Kept Secret), p. 5.

In addition to an examination of the dossier the Committee conducted talks with several of the AIVD's staff.

The report is arranged in the following way. Section 3 gives an introduction on the subject of official messages. Attention is paid to the statutory basis for the external provision of information (section 3.1), the statutory requirements for issuing an official message (section 3.2), the procedure for the coming about of an official message (section 3.3) and the recipients of official messages (section 3.4). Subsequently, in section 4 the findings of the investigation are explained. Discussed here are, successively, the motivation of the official message (section 4.1), the secrecy regarding sources and *modus operandi* (section 4.2), the use of special powers (section 4.3), the statutory basis of the official message (section 4.4), official messages to the Public Prosecutions Department (section 4.5), official messages to the Immigration and Naturalisation Service (section 4.6), the use of official messages in legal proceedings (section 4.7) and the obligation to adhere to the protocol (section 4.8). Section 5 gives conclusions and recommendations as a result of the investigation. The report is concluded in section 6 by answering the central question of the investigation.

### **3. Official messages**

#### *3.1 Statutory basis for the external provision of information*

The WIV 2002 makes use of a closed system of providing information, which means that information can only be brought outside the AIVD if there exists an explicit statutory basis for this. Section 3.3.2 of the WIV 2002 deals with the external provision of information. Issuing an official message is a form of external provision of information. The term 'official message' is not embedded in the law. In the explanatory memorandum the concept has been given substance by the following consideration: "If on the basis of the information to be provided by the competent authority measures are expected to be taken against the person concerned as a result of which this person is harmed in his legitimate interests, the provision is to be made by a written (open) official message"<sup>3</sup>.

Pursuant to section 3.3.2 WIV 2002 official messages can be issued on three grounds. First, an official message can be provided on the basis of article 36, paragraph 1, WIV 2002. The article provides that the services in the context of the proper performance of their tasks are entitled to make announcements regarding, by or on behalf of the service to the Minister whom these concern (sub a), other administrative bodies whom these concern (sub b), other persons or bodies whom these concern (sub c) or eligible foreign intelligence and security services, as well as other eligible international security, liaison intelligence and intelligence bodies (sub d). Since the AIVD has no executive powers<sup>4</sup> the service is to provide intelligence to the persons and bodies who can take measures if this is necessary to protect national security. Article 36, paragraph 1, WIV 2002 offers this possibility. The article refers to making an announcement on 'information processed'. In the explanatory memorandum<sup>5</sup> it is explained that in particular the concept of 'information processed' was opted for in order to express that it will often concern information that has been processed by the service in some way and not the information that (originally) lay at the basis of the announcement. For the provision

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<sup>3</sup> *Parliamentary Documents II 1997/98*, 25 877, no. 3, p. 55 (Explanatory Memorandum).

<sup>4</sup> The AIVD is however entitled to deploy natural persons who under the responsibility and instruction of the AIVD are charged with promoting or taking measures to protect the interests to be promoted by a service (article 21, paragraph 1, sub a under 2 WIV 2002).

<sup>5</sup> *Parliamentary Documents II 1997/98*, 25 877, no. 3, p. 56 (Explanatory Memorandum).

of the original information such as a transcription of a tap or the report of a meeting with a source will often be impossible because in doing so the sources and *modus operandi* is relinquished, which is not permitted pursuant to article 15 WIV 2002.

An announcement which takes place in the context of the proper performance of tasks (article 36 WIV 2002) is made by the Minister if the nature of the announcement gives rise to this (article 36 paragraph 2 WIV 2002).

According to parliamentary documents this will at any rate be the case if the announcement involves a major political risk.<sup>6</sup> In its investigation the Committee has not come across any official message of such a nature.

In addition, pursuant to article 38 WIV 2002 an official message, via the National Public Prosecutor for Counter-terrorism (hereinafter: LOvJ), can be provided to the Public Prosecutions Department in order to inform the Public Prosecutions Department of information which in the execution of its task has come to the knowledge of the AIVD and which can also be relevant in the investigation or prosecution of criminal offences, without prejudice to situations in which there is a statutory obligation to do so. Any information regarding matters which are directly related to the performance of its tasks by the service, such as terrorism and counter-intervention, can be provided to the LOvJ based on article 36. Article 38 WIV 2002 has been included in the law in order to inform the Public Prosecutions Department of the so-called side-catch. These are matters which have no common ground with the AIVD's task, but which the service comes across accidentally.

Article 38, paragraph 1, WIV 2002 provides that the announcement to the Public Prosecutions Department is made to the designated member of the Public Prosecutions Department. This role has been assigned to the LOvJ. This function is currently filled by two persons.

The power to provide information to the Public Prosecutions Department is discretionary by nature.<sup>7</sup> It would stand in the way of a proper performance of the AIVD's tasks if each time it comes across a criminal offence it had to report this to the Public Prosecutions Department. For the consequences of making such an announcement is that the Public Prosecutions Department may decide to proceed to an investigation or prosecution. This would frustrate the AIVD's own investigation. Although this concerns a discretionary power, the Explanatory Memorandum<sup>8</sup> states that it is self-evident that if serious crime is involved, the room for deciding not to make any announcement on this is very limited if not nil. For the sake of completeness it is noted that in the current investigation the Committee has focused on the official messages actually sent. The question whether in a specific matter an official message should have been sent while this has not happened, is a question that is answered by the Committee if in the context of one of its investigations it comes across such matter.<sup>9</sup>

With the addition of 'without prejudice to situations in which there is a statutory obligation to do so' article 38 paragraph 1 WIV 2002 appears to restrict the AIVD's discretionary power in certain cases. For example, public servants who in the performance of their tasks take cognisance of criminal offences in the administrative sphere, have an obligation to report this (article 162 Code of Criminal Procedure). During the parliamentary discussion on the legislative proposal WIV 2002 the question was raised whether this

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<sup>6</sup> *Parliamentary Documents II* 1997/98, 25 877, no. 3, p. 57 (Explanatory Memorandum) and *Parliamentary Documents II* 1999/2000, 25 877, no. 8, p. 127.

<sup>7</sup> *Parliamentary Documents II* 1997/98, 25 877, no. 3, p. 58 (Explanatory Memorandum).

<sup>8</sup> See note 7.

<sup>9</sup> The Committee has answered this question for example in its supervisory report on the investigation into the legitimacy of the execution of a counter-terrorism operation of the AIVD (CTIVD no. 7), *Parliamentary Documents II* 2005/06, 29 924, no. 10 (appendix), see also [www.ctivd.nl](http://www.ctivd.nl).

obligation to report was to be adjusted for the intelligence and security services. The answer was as follows:

“It is indeed possible that public servants of the AIVD or the MIVD in using special powers, but also in other ways, are confronted with crimes. The interest of the service may indeed under certain circumstances oppose that a report is made; this is in particular the case if due to the report made investigations by the service would be seriously frustrated or if for example sources or specific *modi operandi* of the service would come into the open. Whether a report is to be made is to be decided for each case individually. It is not so, however, that in each case the interest of the service will prevail over the interest involved in the investigation and prosecution of criminal offences. In case of serious crime such as murder or homicide it is difficult to imagine that the interest of the service prevails. Article 162 of the Code of Civil Procedure in our opinion does not stand in the way of the procedure described above. The obligation to report laid down in article 162 is moreover limited in the sense that it encompasses only a certain category of crime, namely crime in the administrative sphere as well as crimes constituting an infringement on an arrangement the execution of which is assigned to those obliged to report the crime. The crimes with which public servants of the service are confronted, will however often fall outside this category.”<sup>10</sup>

In the effectuation of the WIV 2002 the viewpoint was adopted that the AIVD was not obliged to make a report in the meaning of article 162 Code of Criminal Procedure if the interest of the service would oppose making such a report. The text of article 38 WIV 2002, in the Committee’s opinion, would leave no room for such a nuance. The Committee advises the Minister to study this point in more detail, in the context of which on the one hand said interests of the AIVD are to be taken into account and on the other hand the interests of an incorruptible administrative system that benefits from reports of crime in the administrative sphere.

Furthermore, the WIV 2002 in article 39 offers the possibility that on the basis of urgent and important reasons information is provided to persons and organisations involved in a public task pursuant to a governmental order. By order of 22 September 2004<sup>11</sup> the following persons or bodies were designated in this regard: the Ministers, De Nederlandsche Bank N.V. (the Dutch Central Bank), the Stichting Autoriteit Financiële Markten (the Financial Markets Authority Foundation), the Pensioen- & Verzekeringskamer (the Pension and Insurance Board) and the mayor in so far as relating to his task to maintain public order and his task to give advice on proposals to grant royal honours.<sup>12</sup>

### 3.2 *Statutory requirements for issuing an official message*

Providing information is a form of data processing in the meaning of article 1, sub f, WIV 2002, in which data processing is described among other things as “providing by means of forwarding, disseminating or any other form of making available”. The processing of data is

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<sup>10</sup> *Parliamentary Documents II* 1999/2000, 25 877, no. 8, p. 120 (memorandum relating to report)

<sup>11</sup> Order of 22 September 2004 to designate people and organisations based on article 39, first paragraph, of the Intelligence and Security Services Act 2002 (Designation order 39 WIV 2002), Bulletin of Acs and Decrees 2004, 506.

<sup>12</sup> For a further elaboration of the external provision of information to mayors reference is made to the report ‘*Permanent Connections. An advice to the Minister of the Interior and Kingdom Relations on the provision of information in the area of security by national services to mayors*’ of the Working group provision of information – mayors, published among other things on [www.aivd.nl](http://www.aivd.nl). This report was offered by the Minister to the Lower House by letter of 21 December 2005, *Parliamentary Documents II* 2005/06, 29 876, no. 9.

subject to the general provisions of section 3.1 of the WIV 2002. This means among other things that providing information is to take place in accordance with the law and in an appropriate manner and with due care (article 12, paragraph 3, WIV 2002). This requirement of due care in relation to providing information is also expressed by article 41, paragraph 1, WIV 2002, which states that no personal details will be provided if their accuracy cannot reasonably be established or which were processed more than ten years ago, while no new data have been processed with regard to the relevant person.

In addition, data processing can only take place with a special purpose and only if necessary, in so far as relevant here, for the proper execution of tasks laid down in the WIV 2002 (article 12, paragraph 2, WIV 2002). Furthermore, data processed on the basis of article 12, paragraph 4, WIV 2002 are to be provided with a designation regarding the extent of reliability or a reference to the document or source from which the data were derived.

Article 40 WIV 2002 provides that personal details are communicated in writing if the person or body to whom the announcement in hand is made, is entitled as a result of this announcement, to take measures. In urgent cases an announcement can be made orally. In that case the announcement is to be confirmed in writing as quickly as possible (article 40, paragraph 2, WIV 2002). During the investigation the Committee has ascertained that the AIVD observes due care in handling this procedural requirement.

Lastly, article 42 WIV 2002 provides that a record is kept of the provision of personal details (the so-called protocol obligation).

### *3.3 Procedure for the coming about of an official message*

In its handbook the AIVD has included the procedure of how an official message is to come about. The handbook is regularly adjusted to the situation in practice. The period covered by the investigation saw two versions of the handbook. In outline these handbooks were in line with one another.

A team's analyst or editor produces a draft text of the official message. It is to be clear on what the contents of the official message were based. This is done by including footnotes in the draft text of the official message, which refer to the source from which the data were derived or by marking the text fragments in the underlying documents which were used for the contents of the official message. According to the older version of the handbook the draft official message was also to be accompanied by a supplementary memo with a reference to the source material and reference to any particulars, as well as a file with copies of the documents used within the context of the official message and a background memo containing relevant operational particulars of the source (for example reliability). In the later version of the handbook this stipulation had been removed. The Committee is convinced that it would benefit orderly data processing if a supplementary memo is added to the underlying dossier of an official message containing a reference to the documents which underlie the official message and reference of any particulars. This makes it easier to determine the origin of the information based on which the official message came about. This simplifies not only the supervision by the Committee, but also has another consequence, namely that persons to whom insight is permitted in the underlying dossier, can accurately verify the information in a simple way. The AIVD is momentarily reviewing its entire Administrative Organisation. In this context the handbook for the procedure for the coming about of official messages is also being reviewed. The Committee advises to again include in the renewed handbook that a supplementary memo is added to the underlying dossier of an official message.

After the draft-official message with the underlying documents has been submitted to the relevant person within the directorate, and approved, the draft is assessed by the Cabinet and Legal Affairs department (KJA). If the Public Prosecutions Department is the addressee of the official message, there will always be prior consultation with the LOvJ.<sup>13</sup> Consultations on the need for information of the recipient and the AIVD's possibilities to fill these in principle also take place with other recipients prior to the issue of the official message. For contact with another person than the LOvJ in another version of the handbook permission from the KJA was required. In the later version of the handbook this involvement of the KJA had been removed.

After consultation with the KJA and the recipient of the official message, a definitive official message is prepared. Before this is signed by the (deputy) head of the AIVD, the KJA and the director of the relevant department are to agree with issuing the official message. After signing the official message – without the underlying dossier – is sent to the recipient. A copy of the official message, together with copies of the underlying documents, is archived in the appropriate place.

### *3.4 The recipients of official messages*

The increased incidence of terrorist attacks and the terrorist threat in the past few years have increased the pressure in the Netherlands to have the whole chain from gathering intelligence by the AIVD up to the actual frustration of terrorist activities by executive agencies function adequately. The number of official messages has strongly increased as a result of this development, because these reports constitute the link between the secret intelligence work and the public trajectory in which measures can be taken.

Over the past few years the number of official messages sent by the AIVD increased from several dozens in 2000 to several hundreds per year in 2004 and 2005. By comparison it is noted that the Military Intelligence and Security Service (MIVD) over the same period of investigation sent out about ten official messages per year. The sphere of activity of the MIVD makes that this service is faced less with issues aimed at persons and organisations which are to be reported to executive agencies.<sup>14</sup>

Most of the AIVD's official messages are sent to the Immigration and Naturalisation department (IND) and – via the LOvJ – to the Public Prosecutions Department. The Ministry of Economic Affairs and the Ministry of Finance also receive a large number of official messages. Information to the Ministry of Finance is provided on persons and entities who appear, or in the AIVD's view should appear, on the EU lists of (financers of) terrorists and terrorist organisations. The bank balances of the persons and organisations on these lists can be frozen.<sup>15</sup> Upon request the Ministry of Economic Affairs receives information on any ties of persons or companies with the proliferation of weapons of mass destruction and/or sensitive projects from a military perspective.

Also several police forces, one mayor, Schiphol, the MIVD and the Ministry of Foreign Affairs received one or more official messages of the AIVD.

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<sup>13</sup> In section 4.5 the prior consultation with the LOvJ is entered into in more detail.

<sup>14</sup> For a more detailed elaboration on the official messages issued by the MIVD we refer to the CTIVD supervisory report number 9b.

<sup>15</sup> More information on these so-called freeze and watch lists can be found on the internet site of De Nederlandsche Bank ([www.dnb.nl](http://www.dnb.nl)).

The provision of information to the MIVD in principle does not take place by means of an official message, because the exchange of information is not, at least not directly, aimed at taking measures. This is different if the AIVD provides information on the basis of which the MIVD or the Ministry of Defence may proceed to taking a measure, for example an administrative measure.

Neither is information provided to foreign intelligence and security services in the form of an official message. For an official message is aimed at taking measures and therefore needs to be suitable for publication. Providing information to foreign intelligence and security services on the other hand takes place secretly and is aimed at extending the knowledge of the foreign service and not, at least not directly, at taking measures. Pursuant to article 37 WIV 2002 information is provided to foreign intelligence and security services only under the condition that the recipient service is not permitted to provide the information to others unless explicitly permitted to do so by the AIVD (the so-called third country rule).

#### **4. Findings of the Committee's investigation**

##### *4.1 Motivation of the official message*

The Committee has assessed the factual accuracy of the information referred to in the report by investigating whether the contents of the official message were substantiated by the information collected by the AIVD for the underlying dossier compiled for the official message. The Committee has established that the contents of the official messages investigated were substantiated by the information available to the AIVD.

The information underlying the official message is verified by the AIVD by assessing it as to its degree of reliability.

Information originating from technical sources (telephone tap, microphone tap, et cetera) is considered to be reliable. If the information was obtained from human sources<sup>16</sup>, the AIVD makes a professional weighing-up to assess whether the information is reliable. If the information originating from the human source is exploited by means of an official message, the Cabinet and Legal Affairs department will also consider the weighing-up that was made in the assessment of the reliability of the information.

For the sake of clarity it is observed that to establish the reliability of the information included in the official message it is not necessary that the information is confirmed by material from other sources. Other factors may also be conducive to establishing the reliability, such as previous experiences with the source and the AIVD's general knowledge level. In so far as information is provided which (for the moment) the AIVD considers to be non-reliable, this is to be referred to as such in the official message. In the Committee's opinion sufficient safeguards are involved in establishing the reliability of the information underlying the official message.

For the recipient of an official message it is important to take cognisance of the degree of reliability of the information made available, in order for a careful consideration to be made

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<sup>16</sup> A human source can be an informer in the meaning of article 17 WIV 2002 or an agent in accordance with article 21 WIV 2002. The main distinction is that unlike an informer an agent is steered by the AIVD. For a detailed elaboration on the difference between informers and agents we refer to the supervisory reports of the Supervisory Committee on the use of agents abroad by the MIVD and AIVD (CTIVD no. 8A and no. 8B).

whether a measure is to be taken with regard to the person involved. Under article 12, paragraph 4, WIV 2002 the AIVD has the obligation to include an indication regarding the degree of reliability or a reference to the document or source from which the information was derived, in the information it has processed, including official messages. Because of the public nature of official messages, apart from exceptional cases no reference will be included to the document or source from which the information was derived, as this give insight into the AIVD's sources and working method, while the service under article 15 WIV 2002 is held to secrecy (see section 4.2). Official messages may consequently, apart from exceptional cases, satisfy article 12, paragraph 4, WIV 2002 by referring to the degree of reliability.

The Committee has established that the AIVD does not invariably state the degree of reliability in the official message. In cases in which the degree of reliability is not stated, the Committee has established that apart from one official message, the contents of an official message were based on information that the service had qualified as reliable. In this exceptional case the AIVD, shortly after issuing the official message in which the degree of reliability had not been stated, obtained information as a result of which the reliability of the information was called into question. Immediately after taking cognisance of this the AIVD issued a second official message stating that the reliability of the information from the first report could not be established. In doing so, in the Committee's opinion, the AIVD has sufficiently remedied the shortcoming.

The Committee urges the AIVD to consequently include an indication of the degree of reliability of the information in the official message.

#### 4.2 *Secrecy of sources and modus operandi in the meaning of article 15 WIV 2002*

An official message is public in the sense that the report has been drawn up in such a way that its contents can be taken cognisance of by third parties without any problems. The decision whether or not to publish the official message is taken by the recipient of the official message and not by the AIVD.<sup>17</sup> For it is the recipients who have the responsibility to determine whether on the basis of the information provided they wish to take measures. The public nature of the official message makes that it may not contain any information on the sources and *modus operandi* of the service. Article 15 WIV 2002 requires that this information is kept secret. An exception to the obligation of secrecy applies to cases in which it is considered necessary, in view of the nature of the announcement and the consequences that may be connected to it, to also grant perusal in the underlying (original) information on the basis of which the official message came about. Articles 38, paragraph 3, 39, paragraph 2 and 40, paragraph 3, WIV 2002 provide the possibility of allowing the recipients perusal in the underlying dossier of an official message. For official messages sent to the LOvJ pursuant to article 38 WIV 2002 the AIVD is held to respond positively to a request for perusal (article 38, paragraph 3, WIV 2002). With regard to other recipients of official messages the AIVD from a statutory point of view is free to refuse a request for perusal.

The Committee has established that in preparing an official message the AIVD has handled its obligation to observe secrecy with due care. In the event the service abandons (part of) the *modus operandi*, for example by including the elaboration of a telephone tap in an official message, the Committee has established that this was preceded by careful consideration.

The Committee is of the opinion that the AIVD attaches great value to keeping secret the identity of its human sources. Information on the identity of the source is not included in the official message and neither can it be derived from it. Also with regard to perusal in the

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<sup>17</sup> *Parliamentary Documents II* 1999/2000, 25 877, no. 8, p. 76.



underlying dossiers by the recipients of the official messages, the identity of the source is kept secret as much as possible. The Committee is aware that it is not always possible to keep the identity of the source secret and that it is not always possible to keep it secret from the recipients of the official message if they are allowed inspection of the underlying dossier. By linking the recipient of the official message's knowledge of the case to the data in the underlying dossier, the source's identity may be exposed. In order to avoid that the information provided by allowing perusal is further disseminated, the WIV 2002 contains an obligation to observe secrecy for the persons and agencies allowed perusal of the data underlying the announcement (articles 38, paragraph 3, 39 paragraph 2 and 40, paragraph 3, WIV 2002 in conjunction with the articles 85 and 86 WIV 2002). The AIVD emphasises this obligation to observe secrecy by generally having the person taking cognisance of the underlying dossier sign a declaration of secrecy. The Committee endorses this working method of the AIVD and recommends continuing it regarding all perusals. By doing so the service also effectuates that it can be found out later to whom perusal was granted of the underlying documents.

#### 4.3 *Use of special powers*

Most of the official messages are based on information obtained by using a special power. In the Committee's opinion the use of these powers satisfied the statutory requirements, including the requirements of necessity (article 18 WIV 2002), subsidiarity and proportionality (articles 31 and 32 WIV 2002).

Information from the official message can be (partly) based on information made available by an agent of the AIVD in the meaning of article 21 EIV 2002. With regard to the reporting of the conversations with an agent the Committee observes the following. Article 33 WIV 2002 provides that a written report is to be made of using a power. A thorough report is indispensable for checking the AIVD's activities.<sup>18</sup> The AIVD's internal regulations provide that a meeting between the AIVD and one of its agents is to be reported integrally in an operations report. Information from an operations report which is important for the performance of the AIVD's tasks is also recorded in an information report so that the information can be distributed within the AIVD without disclosing the agent's personal information. The AIVD's internal regulations are not met by all of its staff as a result of which the recording of meetings with agents takes place in different ways. Sometimes the information from an information report could be traced back to the integral report of a meeting (the operations report), whereas in other cases the information from the information report was not included in the operations report. In the latter case the contact of the human source (the operator) opted for definitively separating the information on (the contact with) the agent from the information relevant for the service's performance of its tasks, due to which no integral meeting report was available. The information from the information report is in this way sometimes difficult to place within the context in which it was obtained.

The AIVD often edits its official messages on the basis of information reports and not on the basis of operations reports. The Committee understands this because the operations reports often contain information that may lead to the identification of the human source. If the operations report were to be included in the underlying dossier, this information would be distributed – which is undesirable – if the recipient of the official message can peruse the underlying documents. However, in so far as in addition to the information report used in the underlying dossier there is no integral meeting report, it is the Committee's opinion that

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<sup>18</sup> *Parliamentary Documents II 1997/98*, 25 877, no. 3 (Explanatory Memorandum), p. 53.

establishing the factual accuracy of the information in the official message and thus the Committee's verification, is impeded. At this moment the Committee has no indications for questioning an accurate representation of the facts in the information reports. Nevertheless it recommends observing the internal regulations as to the recording. This not only allows a more efficient verification by the Committee, but it also ensures that staff members of the AIVD are able to continue to place the facts in the original context.

#### *4.4 Statutory basis of an official message*

The grounds on which the AIVD can issue an official message have been listed restrictively in the WIV 2002, as described in section 3.1 of this report.

The initiative to issue an official message does not always lie with the AIVD. It can also be based on an external request for information. In the context of criminal proceedings and proceedings pertaining to aliens law, increasingly the AIVD is called upon to provide information. The service has a discretionary power to provide data externally and is therefore not obliged to meet a request for information. The AIVD itself has to consider whether it is legitimate and opportune to provide information.

In accordance with the principle of necessity the AIVD may only provide information in so far as this takes place with a specific purpose and only if this is necessary, in so far as relevant in this context, for a proper implementation of the WIV 2002. If in the context of a proper performance of its tasks the AIVD wishes to provide information externally (article 36 WIV), the service is held to always ask itself whether this is necessary. For it should be avoided that information which was obtained in a specific way under the regime of the WIV 2002, is brought outside the AIVD too easily. In so far as there is no need in the context of a proper performance of its tasks to provide information externally, there remain two special provisions in the WIV 2002 based on which the AIVD may exploit information. This concerns the provision of information which does not take place in the context of the performance of its tasks by the service, but due to the interest the recipient of the special report has in obtaining the information. First, information may be provided to the Public Prosecutions Department which may also be important for the investigation or prosecution of criminal offences (article 38 WIV 2002). Second, information may be provided to some designated persons or organisations involved in the performance of a public task, in so far as this information can also be important for promoting the tasks assigned to them in that context (article 39 WIV 2002). For this latter ground for providing information the legislator has formulated special requirements which are to be satisfied before information may be provided; there has to be an urgent and important reason.

The Committee has established that all the official messages sent in the period of investigation were provided on a legal basis and in accordance with the necessity principle.

#### *4.5 Official messages to the Public Prosecutions Department*

The AIVD can provide information to the Public Prosecutions Department in the context of a proper performance of its tasks (article 36 WIV 2002) or if in the processing of information by or on behalf of the service information comes up which may also be relevant for an investigation or prosecution of criminal offences (article 38 WIV 2002). The external provision of information to the Public Prosecutions Department takes place on the basis of article 38, paragraph 1, WIV 2002 by intervention of the LOvJ.

The Committee has established that regular informal consultation with the LOvJ takes place prior to the official issue of an official message to the Public Prosecutions Department on the contents of a (potential) official message. The LOvJ verifies the accuracy of the contents of the official message by perusing the underlying documents and by consulting the AIVD's team involved in the case. For the sake of completeness it is noted that the LOvJ does not assess the lawful acquisition of the information.

The Committee acknowledges the importance of effectively gearing the need for information of the Public Prosecutions Department to the supply of information by the AIVD. The Committee has no objections against this form of (informal) consultation, because the information that is provided in the consultation does not go beyond the LOvJ. For the LOvJ is not permitted, apart from the superiors of the LOvJ under article 86, paragraph 1, WIV 2002, to provide the Public Prosecutions Department with the underlying information to the official message, because the LOvJ is to observe secrecy regarding information of which he knows or should reasonably assume the secret nature (article 38, paragraph 3 in conjunction with 85 and 86 WIV 2002). The LOvJ only forwards to the Public Prosecutions Department the official message officially issued by the AIVD.

Due to the presence of this intermediary a proper gearing pertaining to an official message can take place in the informal preliminary trajectory, but it can also ensure that sensitive information will not unnecessarily be disseminated widely.

The Committee has established that the communication with the Public Prosecutions Department on official messages took place in accordance with the law and in a practical and transparent manner.

#### 4.6 *Official messages to the Immigration and Naturalisation Service (IND)*

The Committee is currently conducting an investigation into the exchange of information between the AIVD and the IND, in which context the communication lines between the AIVD and IND are examined in a wider context. This leaves unimpaired that the Committee, without anticipating the outcome of this investigation, makes several observations in the current supervisory report relating to the provision of information by the AIVD to the IND in the form of an official message.

Providing information to the IND can only take place within the context of a proper performance of its tasks by the AIVD (article 36 WIV 2002). However, additional information may be provided to the Minister of Aliens Affairs and Integration based on an urgent and important reason in the meaning of article 39 WIV 2002.<sup>19</sup> The IND itself has not been designated in the Designation order article 39 WIV 2002 as an organisation to which information can be provided on the basis of article 39 WIV 2002.

In 2003 the AIVD and IND have formulated a covenant<sup>20</sup>, in which further agreements have been laid down on the exchange of information between the two services. The services have agreed in article 1, paragraph 1, of the covenant that the AIVD may provide information to the IND which may be relevant in taking decisions pursuant to the Aliens Act 2002. In doing so the AIVD will have to assess each time whether the provision of information has a

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<sup>19</sup> In article 1 sub a of the Designation order article 39 WIV 2002 (see note 11) 'Our Ministers' are designated as the person as referred to in article 39 WIV 2002.

<sup>20</sup> Covenant regarding the exchange of information between the General Intelligence and Security Service and the Immigration and Naturalisation Service, Government Gazette 19 June 2003, 115, p. 13.

statutory basis in the meaning of the WIV 2002. Information which can only be relevant for the performance of the IND's tasks – i.e. not for the AIVD's performance of its tasks – can, if there is an urgent and important reason for doing so (article 39 WIV 2002), only be provided to the Minister for Aliens Affairs and Integration.

Over the past few years the contact between the AIVD and the IND has been intensified. More and more often decisions taken by the IND are based on official messages from the AIVD. In various legal proceedings the question was raised whether the IND prior to taking measures in connection with an official message issued by the AIVD, *must* first carry out the so-called REK check<sup>21</sup>. This REK check, also referred to as the ascertaining obligation, means that the IND needs to ascertain whether the conclusions in the official message are supported by the documentation on which it is based. Based on established case law of the Administrative Law Decision of the Council of State, an official message can be considered an expert opinion based on which the IND can perform its powers. It is important that the expert opinion provides information in an unbiased, objective and comprehensible way whilst stating – in so far as possible and wise to do so – the sources from which this information was derived. If these requirements are met, in its decision-making the IND may assume the accuracy of this information unless there are concrete indications to doubt the accuracy or completeness of this information. In two rulings of the District Court of The Hague<sup>22</sup> this line of reasoning has been further detailed by considering that as the facts and circumstances are described more specifically and in more detail in the official message, the IND may be more prone to conclude that the official message is sufficiently clear and accurate as a result of which the IND may abstain from conducting any further investigation. If the official message is limited to mere qualifications and/or conclusions, or if the qualifications and/or conclusions are based on information which to a considerable extent is limited, non-specific and/or can be interpreted in more than one way, the IND will be held to conduct a more detailed investigation. In the District Court's opinion, this investigation can consist of, among other things, the performance of the REK check and/or asking the AIVD additional questions.

If the AIVD wishes to effect that the measure taken by the IND as a result of the official message can be upheld in legal proceedings, the official message is to be sufficiently specific and detailed, or the AIVD needs to allow the IND perusal of the underlying documents and/or provide more background information. On the basis of the WIV 2002 the AIVD retains the right to refuse a request for perusal.

The WIV 2002 does not prescribe that official messages to the IND are sent via the intervention of a designated officer, as is the case for example with the LOvJ at the Public Prosecutions Department. However, article 3, paragraph 1, of the covenant between the AIVD and the IND on the exchange of information states that the Head of the Special Affairs Bureau of the IND acts as 'point of contact for operational matters'.<sup>23</sup> In the current investigation the Committee has established that for the provision of information to the IND there is no clear procedure as to the way in which communication with the IND takes place

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<sup>21</sup> The phrase 'REK check' came about after a decision of the Legal Uniformity Division of 16 April 1998, in which it was considered that the Secretary of State of Justice, in the context of the preparations of a decision, is to ascertain that the conclusions from an individual official message issued by the Ministry of Foreign Affairs is supported by the investigation that was conducted.

<sup>22</sup> District Court The Hague 17 February 2006, *LJN number* AV3754 and District Court The Hague 10 March 2006, registration number AWB 05/33603, which had not been published upon publication of this report.

<sup>23</sup> The Special Affairs Bureau has been abolished. It has been replaced by the Security and Integrity Bureau.

on the (underlying dossiers to the) official messages. The Committee considers it recommendable that, in view of the increased number of official messages to the IND and the line developed in case law that more openness to the IND is necessary, the AIVD makes a sound agreement on the way in which it communicates with the IND on official messages. The Committee suggests making an arrangement whereby, as is the case with the LOvJ at the Public Prosecutions Department, a regular officer at the IND is appointed as contact in connection with official messages, in order to limit as much as possible the publication of the AIVD's sources and *modus operandi* to persons outside the service.

#### 4.7 *Use of official messages in legal proceedings*

In the past few years the AIVD has issued increasingly more official messages. The recipients of the official messages make frequent use of the information provided in substantiating the measures to be taken. In criminal law and aliens law this has resulted in increased case law on the use of official messages.

As already explained in this report, in procedures based on aliens law the official message is under certain conditions considered as an expert opinion, in which case the official message has a certain status from a perspective of evidence. In this context it is important to note that the administrative court has the possibility to request perusal in the underlying documents based on article 8:45 General Administrative Law Act in conjunction with article 87, paragraph 1, WIV 2002, based on which the District Court itself can assess the evidence it considers necessary. The AIVD may impose upon the court secrecy regarding the information that it has taken cognisance of (article 8:29, paragraph 1, General Administrative Law Act). If the AIVD refuses to allow the administrative court perusal, the District Court can draw the consequence it sees fit (article 8:31 General Administrative Law Act).

In criminal proceedings the official message is considered as written evidence, as a result of which it can contribute to furnishing proof. Article 344a, paragraph 3, of the Code of Criminal Procedure however states that an anonymous statement can only contribute to the charges being declared proven, if the statement is supported by other evidence and if the suspect has stated that he does not wish to question the person who has made an anonymous statement. Because of the obligation to keep the AIVD's sources and *modus operandi* secret, often no public statement can be made on the underlying information based on which the official message came about. The present legal system offers the court insufficient room to assess the accuracy and reliability of the contents of the official message. The legislative proposal Witnesses Whose Identity Is Kept Secret<sup>24</sup> seeks to change this by offering the examining magistrate to assess the contents of the official message in special proceedings in which the identity of witnesses is kept secret. After coming into force of the legislative proposals the official message will more often contribute to the evidence in criminal proceedings.

In view of the increased use of official messages issued by the AIVD in legal proceedings and the (increased) evidential value of the official messages the Committee has decided to regularly monitor the AIVD's official messages by using random checks.

#### 4.8 *The obligation to adhere to the protocol in the meaning of article 42 WIV 2002*

Article 42 WIV 2002 provides that the provision of personal details is recorded. This obligation to adhere to the protocol serves on the one hand to enable the Committee's

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<sup>24</sup> *Parliamentary Documents II* 2003/04, 29 743, no. 2 (legislative proposal).

supervision over the provision of personal details. On the other hand the obligation to adhere to the protocol sees to it that the AIVD can pass on corrections to information in a simple way to the persons and agencies to whom or which this information was provided.<sup>25</sup> For this it is necessary not only to know to which persons and organisations the information was provided, but also what information was provided.<sup>26</sup>

In the Committee's opinion with regard to the official messages issued the AIVD meets the obligation to adhere to the protocol, owing to the fact that via the AIVD's digital archive it can be traced to which persons and organisations the official messages have been issued and what the contents of the official message in question were. The AIVD does not automatically keep track of the persons and agencies that have perused the underlying dossier. The Committee recommends keeping track of the perusals granted and recording these, allowing the AIVD to keep track of the circle of persons who are cognisant with the information from the underlying dossier. Already in section 4.2 it was recommended to have the persons who are granted perusal of the underlying dossier sign a declaration of secrecy. An additional advantage is that it can be traced who has taken cognisance of the information with which in the Committee's opinion the obligation to adhere to the protocol is met.

## **5. Conclusions en recommendations**

- 5.1 The text of article 38 WIV 2002 in the Committee's opinion does not offer the AIVD any room where appropriate to abstain from the statutory obligation to report a criminal offence in the meaning of article 162 of the Code of Criminal Procedure. The Committee advises the Minister to study this point in more detail (section 3.1).
- 5.2 During its investigation the Committee has ascertained that the AIVD has handled the requirement that personal details are communicated in writing with due care (section 3.2).
- 5.3 It is the Committee's conviction that it is conducive to the arrangement of the data processing if a supplementary memo is added to the underlying dossier of an official message which contains a reference to the documents underlying the official message and makes mention of any particulars. The Committee advises to include in the renewed official messages handbook that a supplementary memo is to be added to each official message (section 3.3).
- 5.4 The Committee has established that the contents of all the official messages investigated were substantiated by the information collected by the AIVD in an underlying dossier compiled for the official message (section 4.1).
- 5.5 In the Committee's opinion sufficient safeguards are involved in establishing the reliability of the information underlying the official message (section 4.1).
- 5.6 The Committee has established that the AIVD does not always give an indication of the degree of reliability in the official message. The Committee urges that an indication of the degree of reliability of the information is always stated in the official message (section 4.1).

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<sup>25</sup> *Parliamentary Documents II* 1997/98, 25 877, no. 3, p. 60.

<sup>26</sup> *Parliamentary Documents II* 1999/2000, 25 877, no. 8, p. 75.

- 5.7 The Committee has established that in preparing the official message the AIVD handles its obligation to observe secrecy with due care (section 4.2).
- 5.8 The Committee recommends having all persons allowed perusal of the underlying dossier sign a declaration of secrecy (section 4.2).
- 5.9 The Committee is of the opinion that the use of special powers in obtaining the information on which the official message was based, met the statutory requirements, including the requirements of necessity (article 18 WIV 2002), subsidiarity and proportionality (articles 31 and 32 WIV 2002), (section 4.3).
- 5.10 The Committee recommends observing the internal regulations regarding the recording of meetings with agents in the sense that an integral meeting report is prepared of these meetings and, in addition, in so far as relevant, an information report containing information relevant for the service's performance of its tasks (section 4.3).
- 5.11 The Committee has established that all the official messages issued in the period of investigation have been provided based on a statutory ground and in accordance with the principle of necessity (section 4.4).
- 5.12 The Committee has established that the communication with the Public Prosecutions Department on official messages is in accordance with the law and has been given shape in a practical and transparent way (section 4.5).
- 5.13 The Committee considers it recommendable that the AIVD makes a sound agreement about the way in which it communicates with the IND on official messages. The Committee suggests making an arrangement whereby a regular office, such as the LOvJ at the Public Prosecutions Department, is appointed as contact with respect to official messages (section 4.6).
- 5.14 The Committee has decided to regularly monitor the AIVD's official messages by way of random checks (section 4.7).
- 5.15 The Committee is of the opinion that with regard to the official messages issued the AIVD meets the obligation to adhere to the protocol. The Committee recommends to also keep track of the perusals allowed so that the AIVD can keep track of the persons cognisant with the information from the underlying dossier (section 4.8).

## **6. Final observation**

The central question in the Committee's investigation was whether the official messages were in accordance with the law and had been effectuated in an appropriate way and with due care (article 12, paragraph 3, WIV 2002). Based on the above conclusions the Committee's final conclusion is that the AIVD's official messages which were issued in the period from January 2004 up to October 2005 were in accordance with the law and have been effectuated in an appropriate manner and with due care.

Thus adopted at the meeting of the Committee of 31 May 2006.