

## REVIEW REPORT

On the lawfulness of the performance by GISS of the foreign intelligence task

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**REVIEW COMMITTEE**  
FOR THE  
INTELLIGENCE AND SECURITY SERVICES

CTIVD no. 26

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## **SUMMARY**

**Forming part of the review report on the lawfulness of the performance by GISS of the foreign intelligence task**

The investigation of the Committee was directed at the performance by GISS of the foreign intelligence task in the period from January 2006 to July 2010. GISS has had this task since the ISS Act 2002 came into effect. The foreign intelligence task has been assigned to a separate unit within the service, the Foreign Intelligence (FI) unit. GISS has authority to use special, privacy-infringing powers when performing the foreign intelligence task, just as it has when performing the traditional security task. These special powers are not only used in the Netherlands but also abroad, which is at odds with the sovereignty of other countries. It is the opinion of the Committee that this is only acceptable if the ISS Act 2002 is applied by analogy to every act of GISS abroad

The prime minister issues a designation order in which he designates the subjects and regions which GISS is to investigate in the context of this task. The intelligence products of the Foreign Intelligence unit are furnished for policy-making purposes to various ministries, the ministry of Foreign Affairs being the main user. Coordination between GISS and the ministry of Foreign Affairs is necessary to ensure the proper performance of the foreign intelligence task. The Committee has established that such coordination is increasingly taking place.

Investigations regarding foreign countries are not only conducted by GISS, but also by DISS. The working relationship between GISS and DISS with regard to the performance of the foreign intelligence task improved during the investigation period, although it was never entirely tension-free. The Committee underlines the importance of the existing cooperative relations and of close contacts between the teams of GISS and DISS which are working on the same matters independently of each other. The difference of opinion between GISS and DISS about the working procedure of the National Sigint Organisation calls for a close, problem-solving involvement of the coordinator for the intelligence and security services.

The professionalism of the FI unit increased in the investigation period. The Committee has not found any evidence of the unit having investigated subjects and regions falling outside the scope of the designation order. The reasons stated for the use of special powers in performing the foreign intelligence task demonstrate that the FI unit thinks before acting. In some cases, however, the Committee discovered examples of negligence and unlawful situations. These were specific cases involving flawed grounds for the use of special powers,

negligent conduct of operational employees abroad with superiors being insufficiently committed, lack of financial checks, absence of permission for the deployment of two agents and failure in the duty to ensure an agent's security.

The Committee considers it highly important that the services, using their knowledge and experience of the foreign intelligence task, work with a critical approach on improving the preparation for operational activities abroad and on a more systematic and timely evaluation of these operations. It is necessary, for example, to provide adequate guidance to operational employees who maintain contacts with informers and agents abroad in the context of the foreign intelligence task. The Committee considers it essential that the home base keeps an eye on the operations abroad and the operational employees, so that any operational problems are identified at an early stage and any necessary adjustment can be made. Prior to deploying an agent to a possibly high-risk region, moreover, a risk analysis should be prepared. This analysis must take account of the personality of the agent in relation to his assignment, of his motivation and of his reliability. In addition, the Committee recommends that GISS not start an operation in a region that may pose great risk to its agent until after it has collected sufficient objective information based on which it can, for the purposes of the risk analysis, thoroughly assess the risks of the agent's activities in the region in question.

The Committee points out that the FI unit, having for a long time paid little attention to the preparation of documentation for the agent files, is now making efforts to exercise greater care. It is the opinion of the Committee that preparing an operational plan for each agent operation can be helpful. Finally, the intelligence products which GISS provides in the context of the foreign intelligence task should state either the source or the degree of reliability of the information in order to enhance their usefulness to receivers. The Committee has established that GISS does not always do so and urges the service to adjust the relevant procedure.

See section 6 of the review report for a detailed list of the conclusions and recommendations of the Committee.

## 1 Introduction

Pursuant to its review task under article 64 of the Intelligence and Security Services Act 2002 (further referred to as: ISS Act 2002), the Review Committee for the Intelligence and Security Services (further referred to as: the Committee) investigated the lawfulness of the performance by GISS of the foreign intelligence task. Pursuant to article 78(3), ISS Act 2002, the Committee on 10 September 2007 informed the prime minister, the minister of General Affairs, the minister of the Interior and Kingdom Relations and the presidents of the two Chambers of the Dutch parliament of the intended investigation. Because of other priorities it took longer than usual to complete the investigation. This had the incidental benefit that the Committee could obtain a clear picture of developments in the performance by GISS of the foreign intelligence task.

This report has a secret appendix.

## 2 Organisation of the investigation

The Committee's investigation was directed at the manner in which GISS performs the task described in article 6(2)(d) of the ISS Act 2002.<sup>1</sup> In the interest of national security GISS is charged with the following foreign intelligence task:

“conducting investigations regarding other countries concerning subjects designated by the prime minister, minister of General Affairs, in agreement with the ministers concerned;”

In 2002 a separate directorate, the Foreign Intelligence directorate, was established within GISS to perform this task. In the current organisational structure the directorate has been renamed Foreign Intelligence unit (further referred to as: the FI unit).<sup>2</sup>

The Committee investigated the lawfulness of the investigative acts undertaken by the FI unit to perform the foreign intelligence task in the period from January 2006 to July 2010. In view of the scope of the activities of the FI unit it was impossible for the Committee to conduct an in-depth investigation of all investigative activities of this period. Initially, the Committee focused its investigation mainly on obtaining an overview of the special powers used by the FI unit. When there was reason to do so, the Committee subjected operations to a more detailed investigation. The Committee also paid attention to the cooperation between GISS and other bodies in the course of performing the foreign intelligence task. In addition, the Committee examined policy-related and organisational developments at and around the FI unit in order to obtain a comprehensive picture of the context in which the foreign intelligence task is performed.

The Committee holds the opinion that its findings give a representative view of the activities of the FI unit, but emphasizes at the same time that its investigation was not exhaustive. The fact that it has established some unlawful situations cannot give perfect certainty that all other cases were handled lawfully.

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<sup>1</sup> Since the foreign intelligence task is described in subparagraph (d) of the article mentioned, the task is sometimes called the *d*-task.

<sup>2</sup> This report will therefore use the name Foreign Intelligence unit. The old name of the directorate will only be used for reference to a closed period in the past.

The Committee investigated files and interviewed officials from both within and outside GISS. In addition to the managers of the FI unit, including the director, his deputy and the various team heads, the Committee also talked with representatives of the ministry of Foreign Affairs, the ministry of General Affairs and the Military Intelligence and Security Service (DISS).

The review report has the following structure. Section 3 outlines the relevant theoretical framework for the foreign intelligence task. Section 4 describes how the task has been implemented since the ISS Act 2002 came into effect and what are the policies developed in this area, both the internal GISS policies and policies with respect to the bodies involved in the task. Section 5 deals with the investigative practice at the FI unit, in particular the manner in which the unit made use of special powers when performing the foreign intelligence task. Section 6 contains the conclusions and the recommendations.

### **3 Theoretical framework for the foreign intelligence task**

#### *3.1 Statutory background of the task*

A classified Royal Decree dated 16 February 1946 established the 'Foreign Intelligence Service of the Netherlands Government' (*Buitenlandsche Inlichtingendienst der Nederlandsche Regeering*). It described the task of this service, sometimes referred as BID, the Dutch abbreviation, as follows:

'This service has authority to collect and the duty to pass on to the appropriate place all intelligence from abroad that is important to the Kingdom (...).'<sup>3</sup>

In 1972 the name of BID was changed into *Inlichtingendienst Buitenland (IDB)*, which in English likewise translates as Foreign Intelligence Service. A new Royal Decree was issued, which this time was made public.<sup>4</sup> The task description read as follows:

'Collecting information concerning foreign countries which may be important to the government'<sup>5</sup>

The IDB and its predecessor fell under the responsibility of the prime minister and the ministry of General Affairs.<sup>6</sup> When the IDB was abolished in 1994, the National Security Service (BVD) and the Military Intelligence Service (MID), as they were called at the time, took over a number of the tasks that fitted within the existing task descriptions of these services. The strictly offensive intelligence activities, however, which were aimed at obtaining information regarding subjects not directly related to (actual) threats to national

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<sup>3</sup> Royal Decree number 1 of 16 February 1946, as reproduced in "*Villa Maarheeze*", De Graaff & Wiebes, The Hague: SDU Uitgevers 1998, p. 36. This book describes the history of BID and of IDB. In 1996 a report on these services was published under the title "*Inlichtingendienst Buitenland. Een institutioneel onderzoek naar de Buitenlandse Inlichtingendienst/Inlichtingendienst Buitenland (1946-1996)*", written by Dick Engelen and commissioned by the Public Record Office.

<sup>4</sup> ARA, 2.02.20, Queen's Cabinet, 12649, KB 05/08/72, no. 3, Bulletin of Acts and Decrees 1972, no. 165.

<sup>5</sup> Bulletin of Acts and Decrees 1972, no. 437 and no. 438.

<sup>6</sup> Albeit that from 1970 to 1972 the BID was placed under the ministry of Defence, see "*Villa Maarheeze*", De Graaff & Wiebes, The Hague Haag: SDU Uitgevers 1998, p. 229.

security, were not transferred.<sup>7</sup> The expectation was that in the period following the end of the Cold War there would be no more need for such information, and that this task could be cancelled.

When the bill for the ISS Act 2002 was debated, parliament and government changed their minds. Political developments were disturbing and international relations so tense that it was considered necessary to have a service of one's own to collect information to help determine Dutch policies in international forums.<sup>8</sup> When the ISS Act 2002 was being drafted, the foreign intelligence task was added to the task description of both GISS and DISS (article 6(2)(d) and article 7(2)(e), respectively, of the Act). The subjects and regions to be investigated are laid down periodically by ministerial designation order and distributed between the two services.

### 3.2 *National security*

All tasks assigned to GISS, therefore including the foreign intelligence task, must be performed "in the interest of national security" (opening sentence of article 6(2), ISS Act 2002). The concept of "national security" is the guiding umbrella concept for the activities of GISS and is intended to regulate and define these activities.<sup>9</sup>

The concept of "national security" was used following on from article 8(2) of the European Convention on Human Rights (ECHR), with the result that the interpretation of the concept is determined among other things by existing and future case law on that article. The European Court of Human Rights (ECtHR) has not defined the meaning and scope of the concept<sup>10</sup>, but in various judgments it identified threats to national security. National security can be endangered, for example, by espionage<sup>11</sup>, separatist movements<sup>12</sup>, terrorism<sup>13</sup> and inciting to and approving terrorism.<sup>14</sup> When drafting the ISS Act 2002 the government held - on the basis of the case law of the ECtHR - that the (national) interpretation of the concept of national security left some scope: "the national legislature is allowed a (*wide*) margin of appreciation".<sup>15</sup>

The task description of GISS includes a provision that investigations pursuant to the security task<sup>16</sup> may only be conducted regarding organisations and persons which/who, because of the objectives they pursue or by their activities, give cause for serious suspicion that they constitute a danger to the continued existence of the democratic legal system, or to the security or other vital interests of the state (article 6(2)(a), ISS Act 2002). The description of the foreign intelligence task of GISS (article 6(2)(d), ISS Act 2002) does not state the

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<sup>7</sup> *Parliamentary Papers II 1997/98*, 25 877, no. 3, p. 10 and *Parliamentary Papers II 1999/2000*, 25 877, no. 8, p. 20.

<sup>8</sup> *Parliamentary Papers II 1999/2000*, 25 877, no. 8, pp. 24-26 and *Parliamentary Papers II 2000/01*, 25 877, no. 14, p. 16.

<sup>9</sup> *Parliamentary Papers II 1999/2000*, 25 877, no. 9, p. 13.

<sup>10</sup> Following the decision of the European Commission, ECHR 2 April 1993, case 18601/91 (Esbester/VK).

<sup>11</sup> ECtHR 6 September 1978, case A/28 (Klass/Germany), para. 48.

<sup>12</sup> ECtHR 30 January 1998, case 19392/92 (United Communist Party of Turkey others /Turkey), paras. 33-36.

<sup>13</sup> ECtHR 6 September 1978, case A/28 (Klass/Germany), para. 48.

<sup>14</sup> ECtHR 19 December 1997, case 18954/91, (Zana/Turkey), paras. 48-50.

<sup>15</sup> *Parliamentary Papers II 1999/2000*, 25 877, no. 9, p. 14, with reference to ECtHR 26 March 1987, case A/116, (Leander/Sweden) paras. 59 and 67.

<sup>16</sup> This task is sometimes called the *a*-task, because it is described in article 6(2)(a) of the ISS Act 2002.

requirement of a threatening *danger* to national security. With respect to this task it is therefore sufficient for an investigation to be conducted in the *interest* of national security, as stated in the opening sentence of article 6, ISS Act 2002. When drafting the ISS Act 2002, the government explained this summarily by the following consideration:

“The new foreign intelligence task will enable GISS also to undertake activities aimed at obtaining information regarding subjects not related directly to actual threats to national security.”<sup>17</sup>

With regard to the performance of the foreign intelligence task the government held that the national security interest may play a role in both the short term and the long term.<sup>18</sup> The government added that national security is increasingly influenced by international developments.<sup>19</sup> Section 3.5.1 contains a more detailed description of the relation between the national security interest and the use of special powers in the context of the foreign intelligence task.

### 3.3 *Vital economic interests*

When the bill for the ISS Act 2002 was debated, parliament dealt at length with the question to what extent the services may invoke their foreign intelligence task to conduct investigations into so-called “vital economic interests”. By ministerial memorandum of amendment this interest was expressly included, in addition to the national security interest, as an area of investigation under the foreign intelligence task of GISS – as a species of the ground for exemption “the economic well-being of the country” of art. 8(2) ECHR.<sup>20</sup> This independent ground for investigation was included in connection with the tasks performed by IDB, as the foreign intelligence service was called at the time. Until IDB was abolished in 1994 its foreign intelligence activities had taken place in the areas of science and technology, economy and politics. When the ISS Act 2002 was debated the government said that investigations into these interests could be classified under the umbrella concept of “national security”, but in order to eliminate any possible doubt in respect of the criterion of “vital economic interests” it proposed that this criterion be expressly mentioned in addition to the national security interest. Including “vital economic interests” as an independent criterion had the additional advantage of allowing investigations in this field even if it would not be possible to range them under the national security interest. The government considered this to be a “modest, but nevertheless advisable extension of tasks”.<sup>21</sup>

The Second Chamber took a different view. Labour Party members, for example, used the words “practically unpredictable extension of tasks” and Christian Democrats (CDA) wondered what criteria would be used to determine whether an interest would have to be considered a vital economic interest.<sup>22</sup> Members of Democrats 66 asked whether this meant that a genuine economic espionage network would be established in order to enhance opportunities for our national economy.<sup>23</sup>

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<sup>17</sup> *Parliamentary Papers I* 2001/02, 25 877, no. 58a, p. 2.

<sup>18</sup> *Parliamentary Papers II* 1999/2000, 25 877, B, p. 4.

<sup>19</sup> *Parliamentary Papers II* 1999/2000, 25 877, B, p. 4, 2000/01, 25 877, no. 14, p. 17.

<sup>20</sup> *Parliamentary Papers II* 1999/2000, 25 877, no. 9, p. 2.

<sup>21</sup> *Parliamentary Papers II* 1999/2000, 25 877, no. 9, p. 16.

<sup>22</sup> *Parliamentary Papers II* 1999/2000, 25 877, no. 11, p. 3 and 5.

<sup>23</sup> *Parliamentary Papers II* 1999/2000, 25 877, no. 11, p. 6.

The result of this criticism – which the government characterized as misunderstandings – was that the category of “vital economic interests” was scrapped as an independent item of the foreign intelligence task of GISS. The government made the important comment that investigations in this field would be permitted if national security was at stake. Whether this interest is at stake would have to be decided by the prime minister in consultation with the ministers of the Interior and Kingdom Relations and Defence in a designation order.<sup>24</sup>

This did not immediately satisfy the Second Chamber. Members continued asking critical questions about the possibility of investigations in this field. The minister then stated clearly that it was not the intention that our intelligence services would concern themselves with economic interests, in the sense of business interests and the competitiveness of businesses in the Netherlands. The provision would only apply to matters directly connected with events, plans or measures that were being considered abroad and that would have prominent effects for our country – for our society or our security.<sup>25</sup>

The subject of vital economic interests will come up again below in the context of the question whether GISS performed its foreign intelligence task within the limits of its mandate (section 5.1.2).

### 3.4 *Designation orders*

With respect to its investigations based on the security task of article 6(2)(a), ISS Act 2002, GISS assesses itself which threats to national security are to be investigated. The foreign intelligence task, on the contrary, is characterized by the fact that investigations for this purpose are demand-driven. The targets to be investigated in the context of the foreign intelligence task are put forward by several bodies stating their intelligence needs.

The investigation targets are laid down in a designation order which is adopted, in conformity with article 6(2)(d), ISS Act 2002, by the prime minister in consultation with the minister of Defence and the minister of the Interior and Kingdom Relations. A substantial part of the intelligence gathered by GISS in the context of the foreign intelligence task is intended for the use of the ministry of Foreign Affairs. This is not very surprising since the foreign intelligence task is aimed at placing own information, including secret information, in the possession of the government for use in international consultations, and it is the ministry of Foreign Affairs that is responsible for determining and propagating Dutch foreign policy.<sup>26</sup> There is no mention in Article 6(2)(d), ISS Act 2002, however, of the minister of Foreign Affairs as one of the authors of designation orders. When the bill was discussed in the First Chamber, members of the CDA parliamentary group asked what was the reason for this.<sup>27</sup> In his memorandum of reply the minister of the Interior and Kingdom Affairs explained that the three minister concerned who are mentioned in the bill are all involved with the services’ performance of their tasks in their capacity as ministers responsible for the services. The minister of Foreign Affairs bears no responsibility for any service and consequently does not fall within this category. The minister stated that article 3 of the bill provided for the possibility of inviting other ministers to the consultations of the three ministers concerned, if necessary. Furthermore, the minister of Foreign Affairs could send a representative to the preparatory body for the ministerial consultation, i.e. the Netherlands

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<sup>24</sup> *Parliamentary Papers II* 2000/01, 25 877, no. 14, p. 6.

<sup>25</sup> *Parliamentary Papers II* 2000/01, 25 877, no. 58, p. 35.

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

<sup>27</sup> *Parliamentary Papers I* 2001/02, 25 877, no. 58, p. 4.



Joint Intelligence Committee (Dutch abbreviated: CVIN).<sup>28</sup> The minister pointed out that in the days of IDB the minister of Foreign Affairs was not included in the group of ministers concerned either.<sup>29</sup> After the introduction of the ISS Act 2002 it emerged that the close involvement of the minister of Foreign Affairs with drafting designations orders was required in order to achieve an adequate statement of needs in the context of the foreign intelligence task. In practice, therefore, designation orders are prepared by the prime minister, the ministers concerned and the minister of Foreign Affairs, jointly. A proposed amendment to the ISS Act 2002, dating from 2006, is aimed at formalizing this factual situation by adding “and the Minister of Foreign Affairs” after the words “the Ministers concerned” in article 6(2)(d), ISS Act, 2002.<sup>30</sup>

A designation order prepared by the ministers concerned comprises a public part which broadly formulates the investigation areas. The secret appendix to the order contains a more detailed formulation of the subjects and specifies the regions to be covered by the investigations, and if necessary the degree of priority to be assigned to the subjects. As described in section 3.2 above, it must be in the interest of national security to investigate precisely these subjects and regions. The secret appendix also distributes the subjects and regions between GISS and DISS, assigning subjects whose relevance is predominantly military to DISS. The services may also be jointly responsible for a specific subject and are then expected to properly coordinate their activities with respect to the subject (see section 4.3.3 for details).

### 3.5 *Special powers in the context of the foreign intelligence task*

#### 3.5.1 Special powers and national security

Article 18, ISS Act 2002, provides that GISS may only exercise the special powers granted under the Act in so far as this is necessary for the proper performance of the tasks referred to in Article 6(2)(a) and (d). This means that GISS may use special powers for the purposes of the foreign intelligence task. As was discussed in section 3.2 above, an investigation in the context of the foreign intelligence task must have been laid down in a designation order of the prime minister and must be conducted in the *interest* of national security. No *danger* for or *threat* to national security is required for the performance of this task, contrary to the rule applying to the security task. The question arises whether a national security interest is also sufficient to justify the use of special powers. Case law of the ECtHR shows that no *actual* harm to national security is required to justify infringing secret investigations by intelligence and security services. At the least, however, there must be a possibility of national security being harmed, in other words: *potential* harm to national security. If there is no expectation whatsoever of any harm being done to national security, infringement of human rights is not justifiable.<sup>31</sup>

In its investigation of the application of articles 25 and 27 of the ISS Act 2002 the Committee explained this trend in case law and its significance for GISS. In response to its report the minister of the Interior and Kingdom Relations stated that he agreed with the Committee’s

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<sup>28</sup> *Parliamentary Papers II* 2000/01, 25 877, no.3, p. 7.

<sup>29</sup> *Parliamentary Papers I* 2001/02, 25 877, no. 58a, pp. 5 and 6.

<sup>30</sup> *Parliamentary Papers II* 2005/06, 30 553, no. 3, p. 22.

<sup>31</sup> See i.a. ECtHR 6 September 1978, case A/28 (Klass et al./Germany) and ECtHR 26 March 1987, case A/116 (Leander/Sweden).

analysis.<sup>32</sup> This means with regard to the use of special powers by GISS in the context of the foreign intelligence task that it does not suffice to merely state that a subject to be investigated is mentioned in the designation order. The designation order may designate subjects which are to be investigated exclusively in the interest of national security, without necessarily involving any potential harm to national security. A mere reference to approved investigation projects does not suffice either to justify the use of special powers.

In the opinion of the Committee, special powers should only be used in the performance by GISS of the foreign intelligence task in the context of investigations into subjects which may potentially lead to harm being done to national security. Assessing how the harm will eventually materialize is more difficult in the case of the foreign intelligence task than in the case of the security task of GISS. This is due to the fact that the international developments and political intentions investigated by GISS in the context of the foreign intelligence task will often have a possible adverse effect on national security only in the fairly long term. The Committee considers it important, however, that GISS specifies the possible harm to national security when it makes use of special powers in the context of the foreign intelligence task.

### 3.5.2 Special powers abroad

In practice, investigation activities of GISS in the context of the foreign intelligence task will take place both in and outside the Netherlands. The ISS Act 2002 does not include a separate provision on investigation activities abroad.<sup>33</sup> The ISS Act 2002 is a national law which does not include an explicit extraterritoriality principle. It was already stated above that special powers may be used in the context of the foreign intelligence task. As formulated in the ISS Act 2002, however, the foreign intelligence task pertains to investigative activities *relating to* other countries, without mentioning investigative activities *in* other countries. The question is, therefore, whether the mere existence of the foreign intelligence task of GISS and the possibility of using special powers that is linked to it constitutes a legitimation for intelligence activities abroad.

When the ISS Act 2002 was debated in parliament the possibility of carrying out intelligence activities abroad came up for discussion. The assumption was that the Dutch services would be active abroad. A particularly important question was which law ought to apply to these intelligence activities: Dutch law or the law of the country in which the activities take place. It proved to be difficult to bring clarity on the issue. In his written reply to questions the minister of the Interior and Kingdom Relations explained that when the Dutch services carried out intelligence activities abroad they must “naturally” respect the parameters attached to the Dutch jurisdiction.<sup>34</sup> In addition he held that agents must have authority, “subject to stringent conditions”, to commit punishable offences, just as they have in the

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<sup>32</sup> CTIVD review report no. 19 on the application by GISS of Article 25, ISS Act 2002, (wiretapping) and Article 27, ISS Act 2002, (*selection of non-targeted interceptions of non cable-bound telecommunications*), *Parliamentary Papers II* 2008/09, 29 924, no. 29 (appendix), section 3.3, available at [www.ctivd.nl](http://www.ctivd.nl). The reaction of the minister of the Interior and Kingdom Relations can be found in *Parliamentary Papers II* 2008/09, 29 924, no. 29, p. 2.

<sup>33</sup> The Belgian Intelligence and Security Services Act, for example, does have such a provision since recently when the Special Intelligence Methods Act came into effect. With respect to the use of specific and exceptional methods this Act provides that they apply (exclusively) within the territory of the state, see article 18(1) of the Special Intelligence Methods Act of 4 February 2010, which came into effect on 1 September 2010.

<sup>34</sup> *Parliamentary Papers II* 2000/2001, 25 877, no. 14, p. 17.

Netherlands.<sup>35</sup> Powers which GISS and DISS do not have in the Netherlands should not be subsequently “created” abroad, so the minister stated. At a later stage, however, the minister kept open the possibility that nevertheless, if something “is very important for our country”, things will be done “which I might perhaps not do in the Netherlands”.<sup>36</sup> On the other hand the minister emphasized that the limits to intelligence activities abroad are “in principle” determined by the legislation and regulations applying locally.<sup>37</sup> These remarks created confusion and they show that it is not easy to find an unequivocal answer to the question whether or not intelligence activities abroad are lawful. MP Vos (VVD) recommended that if no legally sound solution to the problem could be found, an ethical code of conduct should be drafted governing the services’ conduct abroad.<sup>38</sup> The minister gave a willing ear to this recommendation and expressed his hope of developing an ethical code of conduct in cooperation with the Standing Parliamentary Committee on the Intelligence and Security Services, saying that “naturally” the Review Committee could be involved in the process as well.”<sup>39</sup>.

Under international law, states are sovereign. This means that within their own territory they have full and exclusive authority, subject to international agreements and treaties, to perform legislative, judicial and executive acts. The principle of sovereignty that is recognized all over the world is codified in Article 2(1) of the Charter of the United Nations. If intelligence and security services secretly gather information abroad and the country concerned becomes aware of it, this will be considered infringement of the country’s sovereignty since these are acts by the Dutch executive power on the territory of another state. Intelligence services and their employees or agents operating abroad must realize that the state within whose borders they carry out their activities may take action against them. At that moment they fall under the territorial jurisdiction of the foreign country in question.

In the Netherlands, foreign intelligence and security services require the permission of the minister of the Interior and Kingdom Relations to be allowed to carry out intelligence activities within Dutch territory (article 59, ISS Act 2002). Foreign intelligence services are not allowed to operate independently in the Netherlands and must always work under the supervision of a Dutch service. Interference or espionage by foreign services in the Netherlands may constitute violation of sovereignty, undermining of the democratic legal order, impairment of political and civil service integrity and harm to vital and vulnerable sectors in the Netherlands because confidential and secret information comes into the hands of unauthorized third parties. GISS will therefore investigate such activities on the basis of its security task (article 6(2)(a), ISS Act 2002).<sup>40</sup>

It seems indeed difficult to find an unequivocal answer to the question whether the use of special powers abroad is lawful.<sup>41</sup> It is clear, though, that the use of special powers abroad is

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<sup>35</sup> *Parliamentary Papers II 2000/2001*, 25 877, no. 59, p. 10.

<sup>36</sup> *Parliamentary Papers II 2000/2001*, 25 877, no. 58, p. 42.

<sup>37</sup> *Parliamentary Papers II 2000/2001*, 25 877, no. 14, pp. 21, 22 and also no. 58, p. 42.

<sup>38</sup> *Parliamentary Papers II 2000/2001*, 25 877, no. 58, p. 8, 9.

<sup>39</sup> *Parliamentary Papers II 2000/2001*, 25 877, no. 59, p. 11.

<sup>40</sup> See also CTIVD review report no. 14 on the investigation by GISS into unwanted interference by foreign powers (including espionage), *Parliamentary Papers II 2006/07*, 29 924, no. 18 (appendix), available at [www.ctivd.nl](http://www.ctivd.nl).

<sup>41</sup> For the purpose of initiating an exchange of ideas on this issue between scholars, employees of intelligence and security services and other government officials the Committee organised a (closed) afternoon seminar on the theme of “intelligence activities abroad” on 18 October 2007. A concise report of this seminar is to be found on the Committee’s website: [www.ctivd.nl](http://www.ctivd.nl).

at odds with the principle of sovereignty. As was explained above, the Netherlands itself considers it unacceptable if foreign intelligence services carry out secret activities on Dutch territory. Moreover, there is no formal legitimation for such activities since a national law like the ISS Act 2002 cannot unilaterally legitimize activities in the territory of another state.

The Committee has established that it is general knowledge that many intelligence services do in practice operate across national borders without informing the country concerned. In the parliamentary debate on the bill for the ISS Act 2002 both parliamentarians and ministers proceeded on the assumption that GISS and DISS would deploy special powers (in this case agents) in foreign countries on the basis of their foreign intelligence tasks. Any foreign intelligence task will be seriously curtailed if the service should not be allowed to conduct secret investigations in other countries. If the service can only operate in the Netherlands, it will be very difficult to acquire an independent information position in relation to other countries. It is the opinion of the Committee, however, that the lack of a formal legal basis for such investigative activities is only acceptable if the ISS Act 2002 is applied by analogy to every act of GISS abroad. In the opinion of the Committee the procedures prescribed in the ISS Act 2002 for the use of special powers must be complied with abroad as well.<sup>42</sup>

After the entry into force of the ISS Act 2002 no attempts were made to adopt a code designating which law is applicable to acts of GISS abroad, as had been proposed in parliament and endorsed by the minister. The Committee has established that some confusion was created by the use of the term *ethical* code of conduct in the legislative history, since the debate in the Second Chamber was more about legal issues than about ethical problems. In the opinion of the Committee it will not be necessary to develop a separate code if the ISS Act 2002 is in fact applied by analogy. The Committee points out, however, that the ethical dimension of operating abroad implies that special attention must be devoted to the preparation and evaluation of operations. GISS has developed a code of conduct for handling human sources in general. This code of conduct serves as a guideline for operational employees both in the Netherlands and abroad. The Committee underlines that the possibilities available to the service for carrying out its duty of care are more limited abroad. For this reason the assessment of operational security abroad requires a thorough risk analysis. This will be discussed in greater detail in sections 5.3.1 and 5.3.2 below.

## **4 Organisation of the foreign intelligence task**

### *4.1 Designation orders*

From 2002 to 2008 a designation order was issued every year.<sup>43</sup> The Committee for the Administrative Evaluation of GISS (also called the Havermans committee) established in 2004 that the limited capacity of GISS had been insufficiently taken into account when the designation orders were prepared.<sup>44</sup> Until 2008 designation orders comprised a broad range

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<sup>42</sup> See also CTIVD review report no. 8b on the deployment by GISS of informers and agents, more in particular abroad, section 5.2, not a parliamentary paper, available at [www.ctivd.nl](http://www.ctivd.nl).

<sup>43</sup> Designation order 2002, *Gov. Gazette* 15 July 2002, no. 132, p. 7; designation order 2003, *Gov. Gazette* 25 March 2003, no. 59, p. 7; designation order 2004, *Gov. Gazette* 14 January 2004, no. 8, p. 8; designation order 2005, *Gov. Gazette* 23 December 2004, no. 248, p. 10; designation order 2006, *Gov. Gazette* 20 January 2006, no. 15, p. 11; designation order 2007, *Gov. Gazette* 8 December 2006, no. 240, p. 9.

<sup>44</sup> Committee for the Administrative Evaluation of GISS, "*De AIVD in verandering*", November 2004, p.178.

of subjects and countries. The subjects to be investigated included, for example, international terrorism, proliferation of weapons of mass destruction, internationally organised crime and energy supply security. The number of regions to be investigated was likewise very comprehensive. On the occasion of the so-called “rethinking” of the FI directorate in 2007 (for details see section 4.2) it was established that an effective implementation of the foreign intelligence task would require the designation orders to be considerably curtailed. It was also decided to give designation orders a longer life, in order to achieve more stability in creating and maintaining an information position regarding a specific subject and region. Investigations are currently carried out on the basis of the designation order 2008-2012 which became effective in 2008 and is subject to annual evaluation. Article 1 of designation order 2008-2012 designates the following subjects:

- a. Political intentions, activities and opinions of governments, institutions and inhabitants of specifically named countries or regions (political intelligence). All countries and regions to be investigated must be examined from the perspective of what are the real motives of the main actors, what is the actual influence wielded by the government and what are the goals pursued.
- b. Early recognition and identification of and response to developments in countries or regions posing a potential threat to national security (early warning / quick response). For this purpose the service will collect information, both when asked and on its own initiative, regarding countries and regions not covered by article 1.a.<sup>45</sup>

The explanatory notes to designation order 2008-2012 explain that the purpose of designating subjects to be investigated is to gather information that will enable the Dutch government to decide on foreign policy positions and its conduct of international negotiations on the basis of information in its possession which cannot be obtained or is hard to obtain through other channels, for example diplomatic channels.

Since 2008, therefore, the interpretation of the foreign intelligence task in the designation order has been more offensive (aimed at information about the political intentions of foreign actors) rather than defensive (aimed at information about threats from abroad). The Committee has established that from the first designation order onward there has always been a connection between the subjects and regions mentioned in the order and the national security interest. For some subjects (for example proliferation) the connection is more obvious than for other ones (for example certain political intentions). The explanatory notes to the designation order 2008-2012 states the following with respect to the connection between political intelligence and the national security interest:

“The intelligence task regarding other countries must not only be judged on its immediate utility for the Netherlands in the narrow sense. Joint European efforts and efforts at alliance or international levels are also factors to be considered when deciding whether and to what extent intelligence activities serve the interest of national security.”<sup>46</sup>

In the designation order 2008-2012 an *early warning quick response* task was added in article 1(b) in order to give the services the opportunity to investigate developments which are not immediately perceivable, not yet known or which arise suddenly in countries other than those mentioned in the secret appendix. The authorities determining the intelligence needs,

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<sup>45</sup> Designation order 2008-2012, *Gov. Gazette* 25 July 2007, no. 141, p. 21 and evaluated designation order 2010-2012, *Gov. Gazette* 30 December 2009, no. 20374, p. 1.

<sup>46</sup> Designation order 2008-2012, *Gov. Gazette* 25 July 2007, no. 141, p. 21 and evaluated designation order 2010-2012, *Gov. Gazette* 30 December 2009, no. 20374, p. 2.

including in particular the ministry of Foreign Affairs, formulate their wishes regarding this task in a request for intelligence to the FI unit. The FI unit then examines if and how the request can be met. Given that this designation order is more limited in scope and has a longer life than the preceding designation orders, the *early warning quick response* task offers the possibility of responding to new developments. In addition, in view of the longer life of the current designation order, it is evaluated every year and adjusted if the evaluation gives reason to do so. Since the present designation order came into effect, a classified supplemental designation order has been included, which relates to a specific region.

#### 4.2 Foreign Intelligence Unit

Within GISS, the foreign intelligence task has been assigned to the Foreign Intelligence Unit (formerly: directorate) (abbreviated as FI), headed by the FI director. When the ISS Act 2002 was drafted, the option of making it a separate directorate was explained as follows:

*“It (the foreign intelligence task, CTIVD) is a sensitive task, as can indeed be deduced from the special political decision-making process regarding the assignment of subjects. Because of the related need for careful procedures and quality control, and because the relevant unit must be identifiable to foreign intelligence services, the choice has fallen on setting up a separate directorate. Positioning the task at directorate level will facilitate the incorporation of the necessary organisational «checks and balances» while it allows better oversight of the performance of the task, also in a procedural sense, than if these tasks were to be assigned to existing directorates. Finally, assigning this task to a separate directorate will do greater justice to the specific political decision-making procedure for designating the subjects to be investigated. In this new directorate various disciplines will cooperate to achieve independent assessment procedures and professional cooperation with sister services in other countries. At the same time the service will have to guard against the emergence of a relationship of too great dependence on the sister services.”<sup>47</sup>*

When the FI directorate was set up, the intention was to let its staff expand within a relatively short time and to build up expertise. In 2004 the Havermans Committee established that the greatest problem of the FI directorate was its shortage of manpower.<sup>48</sup> In the period covered by the present investigation the Committee has found that particularly the shortage of translators and operators was a matter of concern to the FI unit. By now, however, the FI unit’s staff has largely reached full complement.

In 2004 the Havermans Committee also expressed concern about the unilateral way of gathering intelligence at the FI directorate. According to the Havermans Committee, a lack of capacity and control and a designation order with too wide a scope had resulted in intelligence gathering being focused primarily on information that was relatively easy to obtain. If the FI directorate was to produce added value, so the Havermans Committee wrote, it would have to make use of special powers.<sup>49</sup>

In 2004 the FI directorate also conducted a self-evaluation. It emerged, among other things, that there was no balance between pretension and potency. The designation order and the high expectations of the intelligence users took insufficient account of the limited capacity of

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<sup>47</sup> *Parliamentary Papers II* 2000/01, 25 877, no. 14 1, p. 8.

<sup>48</sup> Committee for the Administrative Evaluation of GISS, *“De AIVD in verandering”*, November 2004, p. 173.

<sup>49</sup> Committee for the Administrative Evaluation of GISS, *“De AIVD in verandering”*, November 2004, p. 179.

the FI directorate. Subsequently, in 2006 and by order of the service management, the FI directorate and the performance of the foreign intelligence task were evaluated by the quality manager of GISS. The quality manager confirmed the earlier findings, but found that after the critical remarks of the Havermans Committee a positive development had set in. In response to the evaluation a plan of action was presented for “rethinking” the FI directorate in 2007, when the foreign intelligence task had been in place for five years. The plan presented the new approach to the FI directorate:

“The Foreign Intelligence directorate will develop into an offensive intelligence unit which by issuing relevant reports contributes to shaping foreign policy. To achieve this, the Foreign Intelligence directorate will concentrate on producing political intelligence. The emphasis of the Foreign Intelligence directorate is on both acquisition and exploitation.”

With fewer investigations after the new designation order became effective and more operational resources, the directorate sought to create an offensive intelligence unit during the rethinking process, which took from August 2007 until August 2009. At the same time a reorganisation affecting the entire service was started in 2008, which centred on improving internal structures and processes.<sup>50</sup> One of the effects for the FI unit was that the intelligence process became more firmly structured and now functions in the same way as at the National Security unit. In 2010 the foreign intelligence task was subjected once again to internal evaluations. This included a recent user-satisfaction study among users of the products of the FI unit. The results will be discussed below in section 4.3.

The Committee points out that the professionalism of the FI unit has increased, especially since the “rethinking” in 2007. Both the shop-floor workers and the unit management are actively working to achieve a more efficient and careful performance of the foreign intelligence task.

In organisational terms the unit is coordinate with the unit charged with the security task of GISS. This does not change the fact that GISS is by tradition a security service. As a result it has not been easy for the FI unit to develop and strengthen its own position within the service. The unit works on the basis of teams. Up to 2009 the annual assignments to teams indicated how the investigation areas mentioned in the designation order were to be investigated. Since the entire service was restructured, all investigation teams of GISS work on the basis of investigation projects. In a project plan, teams of the FI Unit state precisely how the investigation into a specific element of the designation order will be organised. Investigation projects are renewed annually and subjected to semi-annual interim evaluation, after obtaining the advice of the unit which at GISS is responsible for supervising operations.

The FI unit’s pursuit of being an offensive intelligence unit raises the question whether it can at the same time play a role in gathering rather more threat-related foreign intelligence. The issue of defensive foreign intelligence gathering came up at the press conference on the annual report of GISS for 2009. The head of GISS explained that threats to national security are increasingly coming from abroad. To an increasing extent the attention of GISS is therefore focused on developments abroad, by way of forward defence. The threats in question come from abroad and are aimed at the Netherlands or at Dutch interests abroad. It is the intention of GISS to pay more attention in all the service’s activities to forward

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<sup>50</sup> For more information about the reorganisation see the annual reports 2008 and 2009 of GISS, [www.jaarverslag.aivd.nl](http://www.jaarverslag.aivd.nl).

defence.<sup>51</sup> This may also have an effect on the performance of the foreign intelligence task, among other things because these threats may come from countries that are also mentioned in the designation order. The relation between defensive and offensive activities abroad and the role of the FI unit in this matter had not yet crystallized, however, when the Committee closed its investigation.

### 4.3 *Authorities concerned*

#### 4.3.1 Ministry of General Affairs

Article 4 of the ISS Act 2002 introduced the function of coordinator for the intelligence and security services. The coordinator is appointed by royal decree. Since the entry into force of the ISS Act 2002 the function has been assigned to the secretary-general of the ministry of General Affairs or his deputy.<sup>52</sup> Pursuant to article 4(3) of the Act the coordinator's tasks consist of coordinating the tasks of the services and doing the preparatory work for consultations between the ministers concerned about their policy regarding the intelligence and security services. The coordinator does not have an independent intelligence task of his own<sup>53</sup>, but the heads of the two services must provide him with all the information necessary for the performance of his task (article 5, ISS Act 2002). In 2004 the Havermans Committee reached the following conclusion regarding the role of the coordinator:

“The Committee has established that the ISS coordinator is not capable of actual coordination. The coordinator lacks the instruments required to achieve such coordination. The Committee has doubts about the usefulness and necessity of a coordinator for the intelligence and security service in the present form.”<sup>54</sup>

Designation orders, which govern the foreign intelligence task, are adopted by the prime minister, which might strengthen the coordinator's role with respect to this task. But the Committee has found no evidence that this is the case. The needs statement of the ministry of Foreign Affairs plays a more pronounced role in the adoption of the designation order than that of the ministry of General Affairs. The intelligence needs of the ministry of General Affairs are focused in the first place on subjects that are relevant for the prime minister.

By order of the coordinator or his deputy, the intelligence products of the FI unit are assessed for relevance to the prime minister by the official advisor for the intelligence and security services to the ministry of General Affairs designated for this purpose. If required, the advisor will discuss the prime minister's information needs with the FI unit in between consultations. Once a quarter the advisor evaluates the dispatched intelligence products for relevance to the prime minister at a meeting with representatives of the FI unit or the department responsible for supervising operations.

GISS recently conducted a user-satisfaction survey among users of intelligence products of the FI unit. The survey shows that the ministry of General Affairs is satisfied with the

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<sup>51</sup> This emerges from the news report of 27 July 2010 on the website of GISS, [www.aivd.nl](http://www.aivd.nl), “*Forward defense nader verklaard*”.

<sup>52</sup> See for example royal decree of 27 May 2002, no. 02.002297, *Gov. Gazette* 3 June 2002, no. 102, p. 8 or royal decree of 28 March 2007, no. 07.001064, *Gov. Gazette* 3 April 2007, no. 66, p. 7.

<sup>53</sup> See also the report of the Committee of Inquiry into the Iraq decision-making process, Amsterdam: Boom 2010, p. 319.

<sup>54</sup> Committee for the Administrative Evaluation of GISS, “*De AIVD in verandering*”, November 2004, p. 215.



manner in which a designation order comes into being and with how it is implemented. The intelligence products of the FI unit match the needs of the ministry of General Affairs, so the survey shows. An interview with the coordinator for the intelligence and security services showed the Committee that the coordinator has the impression that the intelligence reports of the FI unit are too often still based on public sources. In those cases he considers the reports to have limited added value.

Consultation about the intelligence and security services between the ministers concerned in the Council for National Security (RNV) is preceded by a meeting of the official Netherlands Joint Intelligence Committee (CVIN). The Netherlands Joint Intelligence Committee is chaired by the coordinator, and meetings are not only attended by the head of GISS and the director of DISS but also by the National Coordinator Counterterrorism and representatives of the ministries of Foreign Affairs, the Interior and Kingdom Relations, Defence and Justice. The prime minister is informed and advised by the coordinator and he chairs the Council for National Security. In the early days of the period investigated by the Review Committee the dangers to national security were the focus of attention for both the Council for National Security and the Joint Intelligence Committee. Since 2009, when GISS and DISS started issuing the three-monthly *Nationaal Inlichtingenbeeld*, more attention has been devoted to the foreign intelligence task. At the time of closing of this investigation the Netherlands Joint Intelligence Committee and the Council for National Security were undergoing a restructuring process, which is to result in a body to be called the Council for Intelligence and Security (RIV).

As will emerge from section 5.4, a difference of opinion exists between GISS and DISS on the procedures at the National Sigint Organisation (NSO). GISS recently requested the coordinator to mediate in this situation. The coordinator complied with this request. At the time of closing this investigation the coordinator was busy identifying the problem areas in the cooperation between GISS and DISS on this point. The Committee agrees that such a dispute between the services is precisely a situation that calls for a close, problem-solving involvement of the coordinator for the intelligence and security services.

#### 4.3.2 Ministry of Foreign Affairs

The necessity of close involvement of the ministry of Foreign Affairs goes beyond its mere involvement in drafting the designation order. In practice, the ministry of Foreign Affairs is the main user of intelligence reports of the FI unit. Consequently, the coordination between GISS as the supplier of information and the ministry of Foreign Affairs as the receiver of information takes place on a daily basis, both at the administrative level and between the teams of the FI unit and the regional divisions of the ministry of Foreign Affairs. These contacts are considerably more intensive and frequent than those between the FI unit and the ministry of General Affairs.

The Committee has established it that was a great challenge for both the FI unit and the ministry of Foreign Affairs to shape this cooperation. The ministry of Foreign Affairs itself has an experienced diplomatic corps which likewise has the purpose of gathering political information. It proved not to be an easy job for the FI unit of GISS to build a unique information position after the ISS Act 2002 came into effect. For a long time, as was stated above, the designation orders described a very broad investigation area. Moreover, the needs statement from the ministry of Foreign Affairs was not sufficiently specific for GISS. The FI management had limited capacity at the time, and did not always succeed in clearly communicating the possibilities and impossibilities for GISS to the ministry of Foreign

Affairs. In 2008 these shortcomings were recognized on both sides and various initiatives are now aimed at improving the situation. For example, the number of countries and subjects to be investigated has been considerably reduced, which enables GISS to use its available resources more effectively. Furthermore, the intelligence products supplied by the FI unit are now evaluated by the ministry of Foreign Affairs for their usefulness and subsequently discussed with the FI unit. The recent user-satisfaction survey by GISS among users of intelligence products of the FI unit confirms the improvements achieved in the coordination between the two bodies.

Employees of the ministry of Foreign Affairs are regularly seconded to GISS and *vice versa*. This leads to a better understanding of each other's procedures and possibilities. Another form of cooperation between GISS and the ministry of Foreign Affairs takes place at a number of embassies. It has been a long-time practice to have official representatives of GISS, known as liaisons, stationed at these embassies. In a protocol, GISS and the ministry of Foreign Affairs have agreed on the details of the role played by liaisons of GISS at embassies. Liaisons are seen as the eyes and ears of GISS abroad and for this purpose they must, among other things, maintain relations with foreign intelligence and security services and keep abreast of developments in the applicable region which are important for the Netherlands. The liaisons are employed by GISS but they do their work abroad under the responsibility of the Ministry of Foreign Affairs. Liaisons are therefore registered in the applicable country as diplomatic employees working for GISS and they must perform their activities in accordance with the diplomatic regulations.<sup>55</sup>

It is the opinion of the Committee that the purpose for which the foreign intelligence task was established can only be served if the interests of the supplier of the intelligence (GISS) and the interests of the main receiver of the intelligence (the ministry of Foreign Affairs) are properly coordinated. The Committee considers the initiatives that have been taken to improve the coordination to be a positive development.

#### 4.3.3 DISS

Pursuant to article 58, ISS Act 2002, GISS and DISS are bound to assist each other as much as possible. Pursuant to paragraph (2) of the article such assistance comprises in any case (a) providing information and (b) providing technical and other forms of support in the context of the use of special powers.

The description of the tasks of DISS also comprises a foreign intelligence task. Article 7(2)(e), ISS Act 2002, gives the same description of investigations concerning other countries as for GISS, with the restriction that the investigations regard matters having military relevance. A designation order is drafted for GISS and DISS jointly. The (secret appendix to a) designation order states which subjects and regions are to be investigated by GISS and which by DISS. Sometimes the services are both charged with investigating a certain subject and are consequently expected to properly coordinate their activities regarding that subject.

DISS has other intelligence tasks as well, one of which may in particular overlap the foreign intelligence task. That is the so-called "a2 task" laid down in article 7(2)(a) under 2°, ISS Act 2002:

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<sup>55</sup> CTIVD review report no. 22a on the cooperation of GISS with foreign intelligence and/or security services, *Parliamentary Papers II* 2009/10, 29 924, no. 39 (appendix), section 6.4, to be found at [www.ctivd.nl](http://www.ctivd.nl).

“conducting investigations of factors that are or may be of influence on maintaining and promoting the international legal system in so far as the armed forces are, or are expected to become, involved.”

For the purposes of this task and the other tasks laid down in article 9(2)(a) and (c), the priorities of the investigations to be conducted by DISS are established annually in the Defence Intelligence and Security Needs Statement. As a rule, the intelligence acquired in the context of these tasks is furnished mainly within the defence organisation.

It emerged from the evaluation of the foreign intelligence task in 2006 by the quality manager of GISS that the working relationship with DISS was seriously disturbed. The desired coordination between GISS and DISS with regard to the foreign intelligence task proved not to be achieved in all cases. According to the quality manager one of the reasons was that DISS said it conducted investigations primarily on the basis of its other intelligence tasks (article 7(2)(a) under 1° and 2°, ISS Act 2002) and that it was not required to coordinate these tasks with GISS. Another reason was the lack of confidence between the FI management and the DISS departments concerned.

Since 2006, GISS and DISS have applied themselves to holding periodic consultations at the various official levels, among other things to improve coordination with regard to subjects and regions investigated by both services. In the review period the working relationship between the services improved in regard to the performance of the foreign intelligence task, although it was never tension-free. It is true that on the shop floor the team heads and analysts of GISS and DISS working on the same matters try to periodically consult with and submit intelligence products to each other prior to dispatching them, but in practice this does not always happen. It is not always possible to draw a sharp dividing line between political and military intelligence, and it is virtually inevitable for the services to investigate the same phenomena in the same regions. The Committee underlines the importance of close contacts between the teams of GISS and DISS that are working on the same matters independently of each other.

The Committee has established that close cooperation (temporary or otherwise) already exists for parts of the foreign intelligence task. In 2008, for example, GISS and DISS set up a joint counter-proliferation team in the focus area of proliferation. Joining teams was a recommendation made by the Committee in its report on the lawfulness of the investigations by GISS and DISS into the proliferation of weapons of mass destruction and means of delivery.<sup>56</sup> Early in 2010 a new structural cooperative relation was established in the context of the foreign intelligence task. The experiences appear to be positive, apart from some start-up problems. The subjects on which the services cooperate are well-suited for being addressed jointly, the chosen form of cooperation seems to work and both services feel the added value of each other's contribution.

#### 4.3.4 Foreign services

Foreign services are an important source of information for investigations in the context of the intelligence task. The FI unit also frequently shares information with foreign services and

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<sup>56</sup> CTIVD review report no. 5b on the lawfulness of the investigation by GISS into the proliferation of weapons of mass destruction and means of delivery, recommendation 6.1. No Parliamentary document, to be found at [www.ctivd.nl](http://www.ctivd.nl).

there is close (operational) cooperation regarding some parts of the investigations. The Committee refers to its review report on the cooperation of GISS with foreign intelligence and/or security services for a more detailed consideration of the nature and lawfulness of the contacts with foreign intelligence services.<sup>57</sup>

## **5 Investigation practices of the Foreign Intelligence unit**

### *5.1 Bound by its mandate*

#### 5.1.1 Designation orders

The Committee has established that until 2008 designation orders were formulated so broadly that the FI directorate of those days had to investigate more areas than it was reasonably capable of doing on the basis of its available capacity. The Committee has not found any evidence of the FI unit having investigated subjects and regions falling outside the scope of the designation order.

When the designation order 2008-2012 entered into force, the FI unit terminated its investigations into a large number of subjects and regions mentioned in the preceding designation order. Since then, teams and team assignments and investigation projects are based on the designation order 2008-2012. The Committee has not found any evidence of the FI unit having investigated subjects and regions falling outside the scope of the designation order since the designation order 2008-2012 entered into force.

The use of special powers may be directed only at countries mentioned in the designation order. In practice, so it has appeared, special powers are not only used with respect to the countries mentioned, but occasionally also with respect to another country, a third country. The aim in such cases is to investigate the relation between the third country and the country mentioned in the designation order. Consequently, the purpose still is to collect intelligence about countries falling within the scope of the designation order. The Committee has not established that the FI investigated the third countries themselves.

#### 5.1.2 Vital economic interests and energy supply security

The designation order of 2006 introduced a new area of investigation, namely “developments which may endanger the security of Dutch and European energy supply”. The designation order does not define the term energy supply security. An advisory report of the Advisory Council on International Affairs and the Energy Council dating from 2005 defined the term as follows:

“the long-term and continuous availability of enough energy to safely meet the needs of society in accordance with as many – preferably market-oriented – conditions as possible and in a way that causes the least possible harm to the environment. All this within the parameters set by the government.”<sup>58</sup>

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<sup>57</sup> CTIVD review report no. 22a on the cooperation of GISS with foreign intelligence and/or security services, *Parliamentary Papers II* 2009/10, 29 924, no. 39 (appendix), to be found at [www.ctivd.nl](http://www.ctivd.nl).

<sup>58</sup> General Energy Council & Advisory Council on International Affairs, “Energised foreign policy. Security of energy supply as a new key objective”, December 2005, pp. 11 and 12, to be found at [www.aiv-advies.nl](http://www.aiv-advies.nl).

In 2007, energy supply security was again included in the designation order as a theme with average to low priority. GISS was designated as the service responsible for the theme.<sup>59</sup> The designation order for 2008-2012 does not mention energy supply security in so many words, although it does fall within the broadly formulated scope of the task of article 1a (quoted in section 4.1 above).

In mid-2006 the Council for National Security established the interdepartmental energy platform. The platform is chaired by the ministry of Foreign Affairs and is composed of representatives of the ministries of Economic Affairs, Agriculture and Innovation, General Affairs and of GISS. The objective of the platform is to exchange information and formulate the specific intelligence needs in the field of energy.

The Committee has established that for a long time it remained unclear what were the tasks and responsibilities of the platform and its members. GISS received little additional direction from the platform for its investigations of the security of energy supply. According to GISS the platform is by now hardly functioning any longer. The ministry of Foreign Affairs is the only party to provide GISS with a needs statement in this field. Jointly, the ministries seem to make limited use of the possibility of having GISS investigate energy supply security. With a view to the limited available capacity, however, GISS does not regard this as inconvenient.

The inclusion of the theme of energy supply security in the designation order raises the question how it relates to the theme of vital economic interests, which parliament, when discussing the ISS Act 2002, did not wish to include as part of the area of responsibility of GISS (see section 3.3). Investigations by GISS in the context of the foreign intelligence task are subject to the requirement that there must be a national security interest, and the use of special powers is subject to the requirement of potential harm to national security (see sections 3.2 and 3.5). More than just economic interests must be at stake. So the service must explain how energy supply or a lack of energy supply with respect to or from a specific region relates to national security. It is quite conceivable that subjects relating to the security of energy supply, for example the effect of the distribution of oil and natural gas supplies, extend not only to economic interest but also to the national security interest.

The Committee has established that the investigations of the FI unit into energy supply security usually show a sufficiently clear connection with national security. The Committee came across one investigation where this was not the case. The reasons stated to substantiate that case were flawed, but the Committee has established that the investigation itself was in fact conducted in the interest of national security. The case is discussed in greater detail in the secret appendix to the report. It was a short-term investigation project which has meanwhile been terminated and which was carried out in the context of the early warning quick response task. Pursuant to the designation order this task aims at the early recognition and identification of and response to developments in countries or regions which are not mentioned in the secret appendix to the designation order but which do pose a potential threat to national security. In the intelligence request from the ministry of Foreign Affairs, not only the security of energy supply, but also Dutch trading interests make up an important part of the reasons stated for the request. GISS had copied these interests into its statement of reasons for the investigation proposal. In the applications for telephone taps these interests again constituted the key element. There was no reference to national security nor any indication that it was legitimate to use the early warning quick response task. In the Committee's opinion the reasons stated for the investigation project and for using a

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<sup>59</sup> Also see GISS Annual Report 2007, [www.jaarverslag.aivd.nl](http://www.jaarverslag.aivd.nl), pp. 66 and 67.

telephone tap were flawed and incompatible with what the Second Chamber had said about vital economic interests in the legislative history. GISS must itself examine intelligence requests from the ministry of Foreign Affairs in the context of the early warning quick response task against the statutory mandate and in doing so it must bear in mind the legislative history.

## 5.2 *Use of special powers, generally*

The FI unit is very much aware that the use of special powers is a necessity if it is to build up an independent information position. This attitude is further encouraged by investigations like those of the Committee for the Administrative Evaluation of GISS and the Committee of Inquiry into the Iraq decision-making process, which stated that the information position was “disappointing” and that there was hardly any “unique information”.<sup>60</sup> GISS intends deploying the available range of intelligence methods when performing the foreign intelligence task. In this section the Committee will single out a number of powers.

It was an objective of rethinking the FI directorate to revise the legal parameters for the use of special powers in performing the foreign intelligence task. For this purpose a survey was done of the legal problems which the directorate encountered in performing the foreign intelligence task. It was found that the legal parameters were sufficiently clear to the teams of the FI directorate and need not be adjusted. The problems recorded were already known and the survey showed that most of the uncertainties on this point could be removed or solved. Legal experts at the unit within GISS that supervises the operational process assess all requests from teams for any use of special powers requiring the permission of the director, the head of the service or the minister. These legal experts should also keep an eye on any other matters of legal significance within the FI unit.

The reasons stated for the use of special powers in the context of performing the foreign intelligence task demonstrate that the FI unit thinks before acting. When stating the reasons for using special powers, however, the FI unit often gives only a scant description of the potential harm to national security that is involved. As was explained in section 3.5.1, it follows from the case law of the ECtHR that privacy-infringing powers may only be used if a potential harm to national security exists. The Committee therefore recommends that henceforth the FI unit give a more detailed description of the potential harm to national security.

## 5.3 *Deployment of agents and informers*

### 5.3.1 General

An important element of operational activities abroad consists of deploying agents and informers. The FI unit has informers and agents in the Netherlands as well. Human sources are an important source of information for the proper performance of the foreign intelligence task. Building a network of informers and agents is a time-consuming affair, as the Foreign Intelligence unit has learned, too.

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<sup>60</sup> Report of the Committee of Inquiry into the Iraq decision-making process, Amsterdam: Boom 2010, p. 341; Report of the Committee for the Administrative Evaluation of GISS, “*De AIVD in verandering*”, November 2004, pp. 178 and 179.

The current designation order with its longer validity and smaller number of regions and themes to be investigated creates an opportunity to expand long-term relations with informers and agents, which was more difficult under the earlier, more broadly formulated designation orders.

The Committee has subjected a number of agent operations of the Foreign Intelligence unit to a more thorough investigation. It emphasizes that it was only a sample check and that the fact that the Committee established some unlawful situations does not give absolute certainty that all other cases were conducted lawfully.

In its report on the deployment by GISS of informers and agents, more in particular abroad, the Committee established the following:

“GISS 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 applicable local legislation, which often differs from Dutch legislation, and the risk of disrupting diplomatic relations.”<sup>61</sup>

The Committee has established that operations abroad require a special effort of the operational employees involved and their superiors. Operational employees working abroad are on the one hand expected to be very independent and on the other hand they must act in conformity with what has been agreed and operational regulations. This may create difficult situations. Situations may occur, for example, in which an operational employee must take an important operational decision but is unable to consult with his superior.

In the secret appendix to this report the Committee describes two cases in which operational employees acted negligently and very negligently, respectively, while operating abroad. They failed systematically to observe the existing internal procedures ensuring careful operational conduct. In response to these incidents appropriate measures were taken at GISS, including measures to protect human sources and measures to ensure stricter compliance with internal procedures. In both cases the Committee has established that the fault for the negligent conduct did not lie only with the employees involved, but also with their direct superiors. These superiors were insufficiently committed to the activities of the operational employees.

The Committee emphasizes the necessity of giving adequate guidance to operational employees who, for the purposes of the foreign intelligence task, maintain contacts with sources located abroad. The Committee considers it highly important that the service use its knowledge and experience of the foreign intelligence task to work with a critical approach on improving the preparatory work for operational activities abroad and on a more systematic and timely evaluation of these operations. The Committee sees a role in this matter for the GISS department responsible for supervising these activities. In this kind of situations it is essential that the home base maintain proper sight of the operations abroad and the operational employees, so that any operational problems are identified at an early stage and any necessary adjustment can be made.<sup>62</sup>

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<sup>61</sup> CTIVD review report no. 8b on the deployment by GISS of informers and agents, more in particular abroad, no parliamentary documents, to be found at [www.ctivd.nl](http://www.ctivd.nl).

<sup>62</sup> See also CTIVD review report no. 25 on the conduct of DISS with respect to two suspended employees, *Parliamentary Papers II* 2010/11, 29 924, no. 59 (appendix) section 8.4, to be found at [www.ctivd.nl](http://www.ctivd.nl).

The importance of complying with internal procedures also finds expression in the difference between informer status (article 17, ISS Act 2002) and agent status (article 21, ISS Act 2002). An informer who is gathering information is not controlled by the service, while an agent is. The explanatory memorandum explains with respect to article 21 that an agent is a natural person purposefully deployed for the targeted collection of information which may be important for the performance by the service of its task.<sup>63</sup> This means that a special power is used only when an agent is deployed. No statutory requirement of prior permission applies to the deployment of informers. Permission for deploying an agent must again be obtained every three months.<sup>64</sup> The three-monthly application for permission serves at the same time as a periodical evaluation of the agent operation. In the application the applicant must demonstrate the necessity, subsidiarity and proportionality of deploying the agent, substantiated by reasons based on the experiences of the past months.

The Committee has established with respect to two operations, both discussed in detail in the secret appendix to this report, that a human source controlled by the FI unit was wrongly assigned informer status for too long (article 17, ISS Act 2002). In one case GISS tried to give agent status to the source with retroactive effect. Since permission for the use of special powers cannot be granted with retroactive effect, the source in question performed activities on the instructions of GISS for one month without having formal agent status pursuant to article 21, ISS Act.<sup>65</sup> During this month, therefore, the deployment of this source was unlawful. In another operation a source was wrongly considered an informer throughout the operation. The source operated in his natural surroundings, which was reason for the FI unit to consider him an informer. At the same time, however, the service exercised fairly intensive control and consequently it should have applied for agent status of the source in conformity with article 21, ISS Act 2002. Because of the wrongful absence of permission to deploy the agent as required by article 21, ISS Act 2002, the deployment of this agent was unlawful, too.

Pursuant to article 43(3), ISS Act 2002, information which has been wrongfully processed must be destroyed. It is, however, problematic to destroy information obtained from human sources. Pursuant to article 15(c), ISS Act 2002, GISS has a duty to ensure the security of sources. In order to be able to assess what are the risks to a source, the service must be aware how the contacts with the source took place and which information the source provided. In this situation it is not responsible to destroy information. In the case of the two aforementioned operations the information must in fact be kept, but not be used for any purposes other than ensuring the security of the source.

The Committee has established that the fact that in both operations the status of the source was established incorrectly or was mistakenly not adjusted, contributed to the failure to take

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<sup>63</sup> *Parliamentary Papers II 1997/98*, 25 877, no. 3, p. 31.

<sup>64</sup> Article 4(1) of the GISS special powers mandate order 2009 provides that permission for the first deployment is granted by the manager of the unit and permission for renewal by the team manager. This mandate order is an order classified as confidential and drawn up by the head of GISS pursuant to article 19(2), ISS Act 2002.

<sup>65</sup> Article 19, ISS Act 2002, provides that exercising a special power “is permitted only, in so far as this section does not provide otherwise, if the relevant Minister or the relevant head of a service on behalf of this Minister, *has given permission* to do so.” When the ISS Act 2002 was debated in parliament it was remarked with respect to the power to take decisions regarding the exercise of special powers that in cases involving privacy it would be appropriate to properly balance interests “prior to exercising the special power”, *Parliamentary Papers II 1997/98*, 25 877, no. 3 (explanatory memorandum), p. 26. Another passage mentioning justification in advance occurs on p. 52 of the explanatory memorandum.



well-considered operational decisions in the operations. In one operation, which is also mentioned in the next section, this resulted eventually in violation of the duty of care pursuant to article 15(c), ISS Act 2002, which for agents has a wider scope than for informers.

### 5.3.2 Operational security of informers and agents abroad

Article 15(c) of the ISS Act 2002 prescribes that the heads of the services have a duty to ensure the security of the persons cooperating in the collection of information. This can be informers (article 17 of the Act), agents (article 21 of the Act) or the service's own employees. The duty of care has a special dimension in relation to the foreign intelligence task. If persons gather information for GISS outside the jurisdiction of the Netherlands, the possibilities for service to discharge the duty of care are more limited than within the Netherlands jurisdiction. This applies even more forcefully if information is gathered in countries with which the Netherlands maintains only limited cooperative relations or diplomatic contacts.

In the context of the performance of the foreign intelligence task the Committee has identified one case in which GISS failed in its duty to ensure the security of persons who cooperate in the collection of information (article 15(c)). This was the operation mentioned in the preceding section and described in greater detail in the secret appendix to this review report.

In view of the special risks entailed by operations taking place abroad, the Committee recommends that the service, prior to deploying an agent to a possibly high-risk region, prepare a risk analysis in which attention is given to the personality of the agent in relation to his assignment, to his motivation and to his reliability. This serves the purpose of assessing whether the agent is suited for operating abroad on his own and will not endanger himself and the interests of the service.

In addition, the Committee recommends that GISS not start an operation in a region that may pose great risk to its agent until after it has collected sufficient objective information based on which it can thoroughly assess the risks of the agent's activities in the region in question for the purposes of the risk analysis.

### 5.3.3 Documentation

Article 16(a) of the ISS Act 2002 prescribes a duty of care for the heads of the services to make the necessary arrangements to ensure that the information processed is accurate and complete. Administrative records and documentation must therefore be organised in such a manner as to ensure such accuracy and completeness. The deployment of and the duty of care for human sources (article 15(b) and (c) of the Act) make it specially important to have proper documentation procedures in place.

In the past years the quality of the files on human sources at GISS was evaluated several times. Throughout the service the shortcomings occurred mainly in the fields of administrative processing, administrative procedures and discipline. This had the result that the accuracy of the source files of agent operations was insufficiently safeguarded. It emerges from both the examination of the files and the interviews conducted by the Committee that for a long time the FI unit gave insufficient attention to the preparation of agent files. Internal evaluations of a number of agent operations demonstrated that poor documentation was one of the causes of operational inaccuracies and negligence in the legal sense. When examining

the files the Committee came across several files that were incomplete or in which applications for permission for or extension of the deployment of the agent were lacking or filed late; the most important of these were already mentioned in section 5.3.1. The Committee has established that efforts are currently being made to solve the administrative and documentation problems and that there are noticeable improvements in this area. The Committee emphasizes the importance of proper documentation, in particular for agent operations.

One documentation element which in the Committee's opinion remains somewhat neglected in the practice of the FI unit is the presence and evaluation of operation plans. Pursuant to the internal regulations applying until early 2010 each agent operation must be based on an operation plan. The new internal regulations prescribe this only for 'high ambition' operations. An operation plan must be evaluated and updated periodically, which is done by means of the reasons given in support of the three-monthly renewal of the agent status (article 21, ISS Act 2002). The Committee came across a considerable number of agent operation files, dating from both before and after early 2010, which did not contain an operation plan. In most of the cases there was no clear explanation for the absence of an operation plan. The Committee holds the opinion that the preparation of an operation plan can contribute considerably to the careful and effective execution of an agent operation. In addition, the presence of an operation plan will facilitate stating adequate reasons for either continuing or ending an operation. The Committee therefore finds it preferable to draw up an operation plan for every agent operation. The Committee recommends including this in the internal regulations.

#### 5.3.4 Financial records

In the case of one agent operation, discussed in detail in the secret appendix to this report, the Committee was struck by the financial aspect of the operation. Substantial sums were paid in this operation. After the financial plan for this operation had been approved, circumstances turned out to have changed, with the result that it was no longer justified to spend the estimated sum. The estimated sum was, however, spent. Enquiries showed that managers and the accounting department did not check in this period whether and how the money had been spent. This lack of financial verification surprises the Committee. In the context of this investigation the Committee did not set itself the task of exercising oversight over secret expenditure of the FI unit in its entirety and therefore confines itself to this remark regarding this single case.

#### 5.3.5 Termination of informers and agents

GISS may decide for various reasons to terminate its contacts with an informer or an agent. It serves the interest of national security and of the security of the person concerned to do so with due care. This, too, forms part of the duty of care of article 15, ISS Act 2002.<sup>66</sup> The annual changes in the designation orders frequently had the result that ongoing investigations were abandoned and informers and agents had to be terminated or transferred. The entry into force of the designation order 2008-2011 was intended, among other things, to achieve greater operational stability. The Committee has not found any

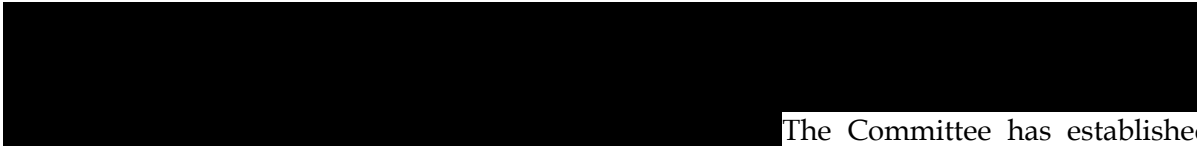
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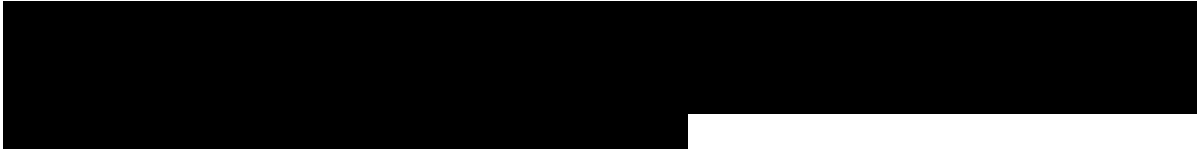
<sup>66</sup> CTIVD review report no. 23 on the conduct of DISS with respect to a former agent, *Parliamentary Papers II* 2009/10, 29 924, no. 47 (appendix), section 4.1.2, to be found at [www.ctivd.nl](http://www.ctivd.nl).

evidence that the service failed to comply with the duty of care in terminating or transferring human sources.

#### 5.4 Use of Sigint

Using the power of article 27, ISS Act 2002, i.e. the selection of non-targeted interceptions of non cable-bound telecommunications (Sigint), is very important for the foreign intelligence task. The fact is that the power to use a technical device for non-targeted interception and recording of non cable-bound telecommunications can in particular yield intelligence with respect to other countries. The Committee established in the review report on the application by GISS of articles 25 and 27, ISS Act 2002, that the use of the relatively new special power under article 27 was still being developed.<sup>67</sup> This is still the case. Various initiatives are being worked out to make a more efficient and effective use of the selection of non-targeted interceptions of non cable-bound telecommunications.

The Committee has established that there has been long-time disagreement between DISS and GISS about the manner of implementing the National Sigint Organisation (NSO). The coordinator for the intelligence and security services recently commenced listing problems in the cooperation between the services. The Committee endorses the involvement of the coordinator with this file (see also section 4.3.1).



Unlike wiretaps, which require a separate and reasoned application for each telephone number, applications for the use of Sigint often cover a great many characteristics (telephone numbers, for example, or e-mail addresses, see article 27(3), ISS Act 2002). In the review report just mentioned the Committee established that applications often do not explain to which person or organisation they relate and why specifically these characteristics must be investigated. In view of the infringement of personal privacy entailed by the use of article 27, the Committee considered this unacceptable and urged GISS to pay sufficient attention to the matter. The absence of reasons was cause for the Committee to refrain from expressing an opinion on the lawfulness of the use of Article 27, ISS Act 2002.<sup>68</sup> In her reaction to this report the minister of the Interior and Kingdom Relations stated that she agreed with the Committee on this point, but at the same time expressed her concern about practical feasibility. GISS promised it would consult with the Committee on the issue.<sup>69</sup> The matter has not been taken up yet since then.

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<sup>67</sup> CTIVD review report no. 19 on the application by AIVD of article 25, ISS Act 2002 (wiretapping) and article 27, ISS Act 2002 (selection of non-targeted interceptions of non cable-bound telecommunications), *Parliamentary Papers II* 2008/09, 29 924, no. 29 (appendix), to be found at [www.ctivd.nl](http://www.ctivd.nl).

<sup>68</sup> CTIVD review report no. 19 on the application by AIVD of article 25, ISS Act 2002 (wiretapping) and article 27, ISS Act 2002 (selection of non-targeted interceptions of non cable-bound telecommunications), *Parliamentary Papers II* 2008/09, 29 924, no. 29 (appendix), to be found at [www.ctivd.nl](http://www.ctivd.nl).

<sup>69</sup> *Parliamentary Papers II* 2008/09, 29 924, no. 29, pp. 5 and 6.

When investigating the use by the FI unit of article 27, ISS Act 2002, the Committee likewise established that applications often do not specify to whom each characteristic belongs and why it is important to learn of the information to be obtained through this specific characteristic. When asked, GISS said this was due to the fact that a Sigint operation typically starts on a broad and not very specific basis. Frequently, no more is known of the available characteristics than that they belong to a person who moves in surroundings the FI unit is investigating. It is not until a the Sigint operation has been running for some time that it becomes clear which specific person it concerns. Another reason why this may take some time is the fact that the use of Sigint yields limited, sometimes disappointing results. As soon as the use of Sigint has produced substantive information, so GISS stated, it will try to provide individualized reasons for using Sigint. In its investigation the Committee did indeed come across Sigint operations where, as the operation progressed, it was in fact stated with increasing clarity to whom the characteristics belonged and why the use of Sigint with respect to these persons was legitimate. There have also been many Sigint operations, however, particularly in earlier years, in which such specific information was never produced.

The Committee has established once again that the privacy infringement entailed by the use of Sigint can be the same as that entailed by the use of wiretapping, since it allows the service to become aware of communications content.<sup>70</sup> GISS should therefore seriously seek to specify the person targeted with Sigint as soon as possible. This effort should be made even if the results obtained by the use of Sigint are limited. The Committee will deal more thoroughly with the legal parameters for the use of Sigint in the report on the use of Sigint by DISS which has not yet been published.

#### 5.5 *Use of wiretapping*

A number of applications from the FI unit for permission to use or extend the use of article 25, ISS Act 2002, gave the Committee cause for further observations in the secret appendix to the report. With respect to some operations the Committee urges GISS to state reasons more carefully. With respect to one operation the Committee repeats what it already established in the secret appendix to its report on the application by GISS of articles 25 and 27, ISS Act 2002. The Committee held, and still holds, the opinion that the operation was unlawful. Apart from these findings the Committee has not detected further unlawful acts.

#### 5.6 *External provision of information*

The investigations conducted by GISS in the context of the foreign intelligence task is aimed at producing relevant information for the ministries of Foreign Affairs, General Affairs, the Interior and Kingdom Relations, Economic Affairs, Agriculture and Innovation and possibly other ministries as well. The Committee's investigation shows that by far the larger part of the information is provided to the ministry of Foreign Affairs. The information is provided to the ministries concerned pursuant to article 26(1)(a), ISS Act 2002. The term "official message" is only used for these external products when they are provided to enable an authorized body to take measures against a person or organisation whose legitimate interests

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<sup>70</sup> *Parliamentary Papers II 1997/98*, 25 877, no. 3, pp. 44 and 45.

are harmed thereby.<sup>71</sup> Since the information provided in the context of the foreign intelligence task will often serve to give further substance to policies or strategies, such provision of information will not be considered an official message. In fact, the FI unit mainly provides information in the form of a short intelligence report or a special intelligence analysis. A short intelligence report reports and comments on an event or development, a special intelligence analysis analyses an event or development and places it in context.

Article 12(4), ISS Act 2002, prescribes that when the service processes information it must either mention the source or give an indication of the reliability of the information. When information is provided to external parties, the duty to protect sources (article 15(c), ISS Act 2002) will often preclude mentioning the source. In those cases an indication of the reliability of the information will suffice. This applies to official messages but also to the external intelligence products provided to the ministers concerned in the context of the foreign intelligence task. It is important for the ministries to learn about the degree of reliability of the information that is made available, since the ministries must be able to carefully assess the value of and the reaction to the intelligence

The Committee has established that many of the products provided to external parties in the context of the foreign intelligence task mention neither the source nor the degree of reliability of the information. This was established once again in the recent survey by GISS of the satisfaction of receivers of intelligence products of the FI unit. The receivers said that this made the information less useful. The Committee confirms this and finds, moreover, that such a procedure is not in keeping with article 12(4), ISS Act 2002. This article prescribes that either the source or the degree of reliability must be mentioned. The Committee urges GISS to adjust the procedure.

## **6 Conclusions and recommendations**

- 6.1 The use of special powers abroad is at odds with the principle of sovereignty. There is no formal legitimation for such activities since a national law like the ISS Act 2002 cannot unilaterally legitimize activities on the territory of another state. On the other hand it is general knowledge that many intelligence services do in practice operate across national borders without informing the country concerned. The foreign intelligence task of GISS would be seriously curtailed if it should not be allowed to conduct secret investigations in other countries. It is the opinion of the Committee, however, that the lack of a formal legal basis for such investigative activities is only acceptable if the ISS Act 2002 is applied by analogy to every act of GISS abroad. In the opinion of the Committee the procedures prescribed in the ISS Act 2002 for the use of special powers must also be complied with abroad (section 3.5.2).
- 6.2 The Committee points out that especially since the “rethinking” in 2007 the professionalism of the FI unit has increased. Both those on the shop floor and the management of the unit are actively working to achieve a more efficient and careful performance of the foreign intelligence task (section 4.2).

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<sup>71</sup> *Parliamentary Papers II* 1997/98, 25 877, no. 3, p. 55, see also CTIVD review report no. 9 on the official messages issued by GISS in the period from January 2004 to October 2005, *Parliamentary Papers II* 2005/06, 29 924, no. 13 (appendix), to be found at [www.ctivd.nl](http://www.ctivd.nl).

- 6.3 The Committee has established that there is a difference of opinion between GISS and DISS on procedures at the National Sigint Organisation (NSO). The coordinator for the intelligence and security services was asked to mediate in this situation. The Committee agrees that such a dispute between the services is precisely a situation that calls for a close, problem-solving involvement of the coordinator for the intelligence and security services (sections 4.3.1 and 5.4).
- 6.4 It is the opinion of the Committee that the purpose for which the foreign intelligence task was established can only be served if the interests of the supplier of the intelligence (GISS) and the interests of the main receiver of the intelligence (the ministry of Foreign Affairs) are properly coordinated. The Committee considers the initiatives that have been taken to improve the coordination to be a positive development. (section 4.3.2).
- 6.5 In the review period GISS and DISS applied themselves to holding periodic consultations at the various official levels, among other things to improve coordination with regard to subjects and regions investigated by both services. There are two areas in which the services cooperate closely. The working relationship between the services improved in the review period in regard to the performance of the foreign intelligence task, although it is never tension-free. The Committee underlines the importance of close contacts between the teams of GISS and DISS that are working on the same matters independently of each other (section 4.3.3).
- 6.6 The Committee has not found any evidence of the FI unit having investigated subjects and regions falling outside the scope of the designation order. Occasionally, the FI unit uses special powers with regard to another, third country. The aim in such cases is to investigate the relation between the third country and the country mentioned in the designation order and to obtain information on the investigated country via the third country. Consequently, the purpose still is to collect intelligence about countries falling within the scope of the designation order. The Committee has not established that the FI investigated the third countries themselves (section 5.1.1).
- 6.7 The Committee has established that the FI unit conducts its investigations of energy supply security within the statutory mandate of GISS. The Committee came across one case in which Dutch trading interests constituted an important part of the reasons given for the investigation project and also of those given for the use made of wiretapping in this context. It is the opinion of the Committee that basing the use of wiretapping on such reasons is incompatible with what the Second Chamber said about vital economic interests in the legislative history (section 5.1.2).
- 6.8 The reasons stated for the use of special powers in the context of the foreign intelligence task demonstrate that the FI unit thinks before acting. When stating the reasons for using special powers, however, the FI unit often gives only a scant description of the potential harm to national security that is involved. It follows from the case law of the ECtHR that privacy-infringing powers may only be used if a potential harm to national security exists. The Committee therefore recommends that henceforth the FI unit give a more detailed description of the potential harm to national security when stating the reasons for the use of special powers (section 5.2).
- 6.9 The Committee came across two cases in which operational employees acted negligently and very negligently, respectively, while operating abroad. The fault for

the negligent conduct did not lie only with the employees involved, but also regarded the responsibility of the direct superiors. These superiors were insufficiently committed to the activities of the operational employees (section 5.3.1).

- 6.10 De Committee emphasizes the necessity of giving adequate guidance to operational employees who, for the purposes of the foreign intelligence task, maintain contacts with sources located abroad. It considers it highly important that the service use its knowledge and experience of the foreign intelligence task to work with a critical approach on improving the preparatory work for operational activities abroad and on a more systematic and timely evaluation of these operations. The Committee sees a role in this matter for the GISS department that is responsible for supervising these activities. In this kind of situations it is essential that the home base maintain proper sight of the operations abroad and the operational employees, so that any operational problems are identified at an early stage and any necessary adjustment can be made (section 5.3.1).
- 6.11 The Committee came across two cases in which an agent was deployed while no permission to do so had been obtained in accordance with the provisions of article 21, ISS Act 2002. Consequently, in the period during which such permission was lacking the deployment of the agents was unlawful. This situation contributed to the failure to take well-considered operational decisions (section 5.3.1).
- 6.12 Pursuant to article 43(2), ISS Act 2002, information which has been wrongfully processed must be destroyed. It is, however, problematic to destroy information obtained from human sources. Pursuant to article 15(c), ISS Act 2002, GISS has a duty to ensure the security of sources. In order to be able to assess what are the risks to a source, the service must be aware how the contacts with the source took place and which information the source provided. In this situation it is not responsible to destroy information. In the case of the two aforementioned operations the information must in fact be kept, but not be used for any purposes other than ensuring the security of the source (section 5.3.1).
- 6.13 The Committee has identified one case in the context of the performance of the foreign intelligence task in which GISS failed in its duty to ensure the security of persons cooperating in the collection of information (article 15(c), ISS Act 2002) (section 5.3.2).
- 6.14 In view of the special risks entailed by operations taking place abroad, the Committee recommends that the service, prior to deploying an agent to a possibly high-risk region, prepare a risk analysis in which attention is given to the personality of the agent in relation to his assignment, to his motivation and to his reliability. This serves the purpose of assessing whether the agent is suited for operating abroad on his own and will not endanger himself and the interests of the service. In addition, the Committee recommends that GISS not start an operation in a region that may pose great risk to its agent until after it has collected sufficient objective information based on which it can thoroughly assess the risks of the agent's activities in the region in question for the purposes of the risk analysis (section 5.3.2).
- 6.15 The Committee has established that for a long time the FI unit paid insufficient attention to the preparation of agent files. Internal evaluations of a number of agent operations demonstrated that poor documentation was one of the causes of

operational inaccuracies and negligence in the legal sense. When examining the files the Committee came across several files that were incomplete or in which applications for permission for or extension of the deployment of the agent were lacking or filed late. The Committee has established that efforts are currently being made to solve the administrative and documentation problems and that there are noticeable improvements in this area. The Committee emphasizes the importance of proper documentation in accordance with the provisions of article 16(a), ISS Act 2002, in particular for agent operations (section 5.3.3).

- 6.16 The Committee came across a considerable number of agent operation files which did not contain an operation plan. The Committee holds the opinion that the preparation of an operation plan can contribute considerably to the careful and effective execution of an agent operation. In addition, the presence of an operation plan will facilitate stating adequate reasons for either continuing or ending an operation. The Committee therefore finds it preferable to draw up an operation plan for every agent operation. The Committee recommends including this in the internal regulations (section 5.3.3).
- 6.17 In the case of one agent operation the Committee was struck by the financial aspect of the operation. Substantial sums were paid in this operation. After the financial plan for this operation had been approved, circumstances turned out to have changed, with the result that it was no longer justified to spend the estimated sum. The estimated sum was, however, spent. In this period managers and the accounting department did not check whether and how the money had been spent. This lack of financial verification surprises the Committee (section 5.3.4).
- 6.18 The annual changes in the designation orders frequently had the result that ongoing investigations were abandoned and informers and agents had to be terminated or transferred. The Committee has not found any evidence that the service failed to comply with the duty of care under article 15, ISS Act 2002, in terminating or transferring human source (section 5.3.5).
- 6.19 The Committee has established that the FI unit, when using article 27, ISS Act 2002, often does not specify for each characteristic to which person or organisation it relates and why it is important to learn of the information to be obtained through this specific characteristic. The Committee has established that the privacy infringement entailed by the use of Sigint can be the same as that entailed by the use of wiretapping, since it allows the service to become aware of communications content. GISS should therefore seriously seek to specify the person targeted with Sigint as soon as possible (section 5.4).
- 6.20 A number of applications from the FI unit for approval to use or extend the use of article 25, ISS Act 2002, gave the Committee cause for some further observations in the secret appendix to the report. With respect to some operations the Committee urges GISS to state reasons more carefully. With respect to one operation the Committee repeats what it already established in the secret appendix to its report on the application by GISS of articles 25 and 27, ISS Act 2002. The Committee held, and still holds, the opinion that the operation was unlawful. Apart from these findings the Committee has not detected further unlawful (section 5.5).



6.21 The Committee has established that many products provided to external parties in the context of the foreign intelligence task mention neither the source nor the degree of reliability of the information. This procedure is not in keeping with article 12(4), ISS Act 2002. This article prescribes that either the source or the degree of reliability must be mentioned. The Committee urges GISS to adjust the procedure (section 5.6).

*Thus adopted at the meeting of the Committee held on 23 February 2011.*