



Review Report

on the implementation of cooperation
criteria by the AIVD and the MIVD

investigation into the execution of
Dutch House of Representatives motion no. 89
(by members Schouw and Segers)

CTIVD no. 48

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Review Committee
on the Intelligence and
Security Services

CTIVD no. 48

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CTIVD no. 48

SUMMARY

for the review report on the implementation of cooperation criteria
by the AIVD and the MIVD

investigation into the execution of Dutch House of Representatives motion no. 89
(by members Schouw and Segers)

Motion no. 89 by members Schouw and Segers

On 9 April 2014 the Dutch House of Representatives held a debate on interception by the NSA and the role of the Netherlands in this activity. During and after the debate, various motions were submitted, including motion no. 89 by members Schouw (D66) and Segers (CU). The purpose of this motion was to achieve greater clarity concerning the assessments forming the basis for the AIVD's and MIVD's cooperation with foreign intelligence and/or security services. In response to this motion, the Minister of the Interior and Kingdom Relations and the Minister of Defence indicated that the existing cooperation criteria with foreign services (including respect for human rights and democratic anchorage) will be included in the ISS Act 2002 to be modified and will be further implemented in the explanatory memorandum. Weighting notes relating to the cooperation criteria are drawn up for foreign services with which cooperation takes place. According to the Ministers, these notes will from now on also devote attention to the assignment of powers and procedures within the foreign services. The CTIVD was asked to oversee execution of the motion.

The investigation

In this report, the CTIVD assessed how the AIVD and the MIVD implement the cooperation criteria in their policy and in the weighting notes. The CTIVD has drawn conclusions concerning policy and practice in the light of the facts established. It is up to the Dutch House of Representatives to assess whether motion no. 89 by members Schouw and Segers has been adequately executed. The CTIVD regards this review report as an interim position. It intends to conduct a final investigation into this topic a year from now.

The weighting note as a safeguard

The AIVD and the MIVD have to assess whether a foreign intelligence and/or security service qualifies for cooperation. The relevant assessments are recorded by the services in a weighting note. The weighting note must provide insight into the limits of the trust that can be placed in the foreign service. Individual cases of cooperation, for example the provision of personal data or of unevaluated data, must be tested against the framework that is defined in the weighting note. Therefore, in each individual case, a two-fold assessment must be made: does it fit within the boundaries of the cooperation as defined in the weighting note and, within those boundaries, does it meet the requirements of necessity, proportionality and subsidiarity? The weighting note thus forms an important safeguard for the protection of privacy.

The weighting note must create the framework for cooperation with foreign intelligence and/or security services. The weighting note should show:

- the extent to which the foreign service meets the cooperation criteria mentioned in the legislative history;

- that the AIVD and the MIVD have made sufficient efforts to identify the legal powers and (technical) possibilities of the foreign service and the level of data protection provided;
- the risks the cooperation can involve and which forms of cooperation are permitted under what conditions.

Conclusions concerning policy

The policies of the AIVD and the MIVD are in line with the current ISS Act 2002. Nevertheless, the CTIVD cites the following shortcomings and areas of concern, among others:

- The policies are unclear concerning the situations that require the Ministers' authorisation for cooperation, while the Ministers themselves promised in the House to create this requirement for cooperation with foreign services that do not meet the cooperation criteria. The Minister of Defence has indicated that the MIVD's policy in this area is being modified.
- The policies of the two services do not discuss assessment of the foreign service's system of data protection (for instance safeguards in the area of data processing, such as the storage and destruction of data) and devote only limited attention to the exchange of unevaluated data.
- The authorisation requirement for the provision of personal data to foreign services that do not meet the cooperation criteria is implemented differently by the AIVD and the MIVD.
- The MIVD's policy is unclear concerning the specific consequences of failure to meet cooperation criteria.

Conclusions concerning drawing up weighting notes

The CTIVD notes that drawing up weighting notes is a comprehensive and labour-intensive process. It involves living documents that require a great deal of effort and regular adjustment.

Conclusions concerning the AIVD's weighting notes

The CTIVD points out that the AIVD gave low priority to establishing weighting notes until early 2015. Some old weighting notes have been undergoing updates for some time now and new drafts are being designed. The CTIVD has the impression that the information in the draft weighting notes that have been developed is limited in depth and scope and is lacking in terms of certain topics. The CTIVD also has questions about the application of the policy frameworks of the AIVD in the draft weighting notes. The CTIVD has informed the Minister of the Interior and Kingdom Relations about this separately and in more detail for the purpose of drawing up final weighting notes. It will review this in its next investigation.

Conclusions concerning the MIVD's weighting notes

The CTIVD finds that, until mid-2015, the MIVD gave limited priority to creating weighting notes. In mid-2015 a new policy was adopted. Since then, more priority has been given to creating weighting notes. At the end of 2015 and in early 2016 the MIVD created seventeen weighting notes. The MIVD indicated that it will be able to draw up several more weighting notes in 2016.

The CTIVD conducted substantive reviews of the adopted weighting notes. It draws the following conclusions:

- In general, the weighting notes each give a detailed explanation of certain cooperation criteria, a brief assessment of whether the foreign service meets the criteria and a clear picture of the cooperative relationship that the MIVD has built up with the foreign service.
- The MIVD is not specific enough concerning the basis for regarding the foreign services in question as professional and reliable.
- Most weighting notes do not identify how the legal powers and (technical) possibilities are assigned within the foreign service or what efforts the MIVD has made to identify them.
- The level of data protection by the foreign service, including the safeguards in the area of data processing, such as storage and destruction of data, is not included in any of the weighting notes. Nor are the efforts made to identify this discussed.

- The permitted forms of cooperation are mentioned in the weighting notes but are not further developed. In that context, the possibility of providing personal data or of providing unevaluated data is also not further substantiated. The CTIVD is of the opinion that the MIVD must indicate, in the weighting notes, what risks can be associated with the cooperation.
- The conclusions in the weighting notes on which forms of cooperation are permitted and which authorisation structure then applies within the MIVD are, in principle, supported by the contents of the weighting notes. In one case the conclusion is not supported by the contents of the weighting note. The MIVD gives no compelling reasons why far-reaching cooperation is permitted, despite the fact that the cooperation criteria are not met.
- In one case, the weighting note states that the cooperation is intended to go further in the long term than is permitted based on assessment of the cooperation criteria. No adequate reasons are given for this.

CTIVD no. 48

REVIEW REPORT

on the implementation of cooperation criteria by the AIVD and the MIVD
investigation into the execution of Dutch House of Representatives motion no. 89
(by members Schouw and Segers)

1 Introduction

Background to the investigation

On 9 April 2014 the Dutch House of Representatives held a debate on interception by the NSA and the role of the Netherlands in this activity.¹ During the debate, various motions were adopted, including motion no. 89 by members Schouw (D66) and Segers (CU).² The motion reads as follows:

“The House

having heard the deliberations,

noting that it is not clear how the criteria for cooperation between the Dutch intelligence and security services and foreign services are implemented, for example with regard to democratic anchorage and the respect for human rights by the other service;

requests the government to pursue more detailed implementation of these cooperation criteria;

requests the CTIVD, in its annual report, to review the execution of this motion;

and proceeds to the order of the day.

Schouw
Segers”

In a letter to the Dutch House of Representatives dated 30 June 2014, the Minister of the Interior and Kingdom Relations, partly on behalf of the Minister of Defence, examines this motion more closely.³ The Minister refers to the cabinet response to the recommendations of the ISS Act 2002 Evaluation Committee (Dessens Committee) of 11 March 2014 and indicates that the existing criteria for cooperation with foreign services will be incorporated in the ISS Act 2002, to be modified. The criteria will be implemented in more detail in the explanatory memorandum of this amendment to the law.

¹ *Proceedings II* 2013/14, no. 73, item 8.

² *Parliamentary Documents II* 2013/14, 30 977, no. 89.

³ *Parliamentary Documents II* 2013/14, 30 977, no. 104, p. 2.

The criteria in question relate to i.e. human rights policy in the relevant country and democratic anchorage, professionalism and the reliability of the relevant foreign service. The law must provide an adequate framework and scope for this.⁴ In addition, both Ministers indicated that weighting notes are being drawn up for foreign services with which cooperation takes place, which discuss the criteria for cooperation. They promised that, from now on, attention will also be devoted to the ways in which powers and procedures are assigned within the foreign services.⁵

On 18 May 2014, the Minister of the Interior and Kingdom Relations forwarded Dutch House of Representatives motion no. 89 to the CTIVD, requesting that it implement the motion and duly inform the Dutch House of Representatives.

Investigative question

The investigative question that the CTIVD answers in this report is, “**How do the AIVD and the MIVD implement the cooperation criteria in their policies and in practice?**” The answer to this question is largely descriptive in nature. The CTIVD does however draw conclusions with respect to the policies of the AIVD and the MIVD and the contents of weighting notes that were adopted **after** the adoption of motion no. 89. It also makes some recommendations. It is up to the Dutch House of Representatives to assess whether motion no. 89 by members Schouw and Segers has been adequately executed.

Structure of the report

The review report has the following structure. Chapter 2 discusses the investigation plan, the methodology and the timeline. Chapter 3 deals with the framework within which the assessment must take place in the light of the cooperation criteria. Attention is devoted here to the legal framework provided by the current law, the ISS 20XX Act Draft Bill, the practice of oversight by the CTIVD and case-law developments. Chapters 4 and 5 examine policy and practice within the AIVD and the MIVD with regard to assessing whether and, if so, to what extent cooperation is possible with foreign intelligence and/or security services. The CTIVD’s conclusions are presented in Chapter 6. Together with the summary, the conclusions contain the key points of this review report.

The report has **no secret appendix**.

⁴ *Parliamentary Documents II* 2013/14, 33 820, no. 2, p. 7.

⁵ *Proceedings II* 2013/14, no. 73, item 8, p. 23 and 45.

2. Investigation plan, methodology and timeline

Previous investigation into international cooperation

The subject of cooperation criteria has previously been discussed in the oversight practice of the CTIVD. In review report no. 22a (2009) the CTIVD assessed the cooperation between the AIVD and foreign intelligence and/or security services.⁶ The investigation period for that investigation terminated in mid-2008. The cooperation of the MIVD with foreign services has also been the subject of an investigation. This is described in review report no. 22b (2015).⁷ The investigation period for that investigation terminated at the end of 2013. In this investigation, the CTIVD was able to build further on its previous findings from the above investigations by using these as a starting point.

Scope of this investigation

In this review report, the CTIVD focused mainly on the current policy for the application of the cooperation criteria. This policy has been further developed within the services since the previous investigations by the CTIVD. For the AIVD, the report looked back to mid-2008 in order to be able to put the current policy into perspective. For the MIVD, the same procedure was used, this time looking back to the end of 2013.

The investigation also focused on the practice of the weighting notes, in other words the way in which the current policy for the application of cooperation criteria has been implemented in weighting notes with respect to foreign intelligence and/or security services. To this end, the CTIVD studied weighting notes adopted after 9 April 2014. No weighting notes were adopted by the AIVD, although there are seventeen drafts that have not yet been assessed by the AIVD management. Seventeen weighting notes have been drawn up by the MIVD. These weighting notes were assessed by the CTIVD.

Weighting notes were drawn up by the AIVD before the adoption of motion no. 89, which now have to be updated. These are weighting notes relating to ten foreign services. In a limited sample, the CTIVD investigated whether the contents of these weighting notes, which accordingly date from before adoption of the motion, were taken into account in proposals to engage in certain forms of cooperation in specific cases, which date from after adoption of the motion.

What was not investigated

The CTIVD did not investigate cooperation in the field of security screenings and any weighting notes and similar documents drawn up in that context, since this concerns a highly specific form of cooperation.

The CTIVD did not review whether cooperation between the AIVD and MIVD and foreign intelligence and/or security services in practice remains within the boundaries of the weighting notes and does not exceed the limits of cooperation defined in these notes. Answering that question requires more extensive investigation.

⁶ CTIVD Review Report no. 22a on the cooperation by GISS with foreign intelligence and/or security services, *Parliamentary Documents II* 2009/10, 29 924, no. 39 (appendix), available at www.ctivd.nl.

⁷ CTIVD Review Report no. 22b on the cooperation by DISS with foreign intelligence and/or security services, *Parliamentary Documents II* 2014/15, 29 924, no. 128 (appendix), available at www.ctivd.nl.

Investigative proceedings

The CTIVD studied the verbatim report of the Dutch House of Representatives' debate of 9 April 2014 on interception by the NSA and the role of the Netherlands in this activity, which led to the adoption of motion no. 89. The CTIVD conducted a file investigation into the systems of the AIVD and the MIVD. It identified the current policies of the AIVD and the MIVD in order to assess the extent to which foreign services (still) qualify for cooperation based on the criteria for cooperation. The CTIVD also studied all the weighting notes drawn up since the adoption of motion no. 89. On the basis of a limited random sample, the CTIVD investigated proposals for the AIVD to engage in certain forms of cooperation in specific cases. In addition to the file investigation, three interviews were held with officers from both services who are in charge of drawing up weighting notes.

Timeline of the investigation

The CTIVD announced the investigation on 2 July 2015 to the Minister of the Interior and Kingdom Relations and the Minister of Defence and to the presidents of the Senate and the Dutch House of Representatives of the States General.

The investigation concluded on 10 February 2016 with the drafting of the report. The Minister of the Interior and Kingdom Relations and the Minister of Defence were given the opportunity, in compliance with Article 79 ISS Act 2002, to respond to the findings given in the review report. The responses from both ministers were received on 8 April 2016. This led to some additions and clarifications, following which the review report was adopted on 4 May 2016.

To be continued

The CTIVD regards this review report as an interim position. It intends to conduct a final investigation into this subject one year from publication of this report.

3 The assessment framework

3.1 Cooperation criteria in the legislative history of the ISS Act 2002

Article 59 ISS Act 2002 contains a **general duty of care** by the service heads regarding cooperation with qualifying foreign intelligence and/or security services. Whether a foreign service *qualifies* for cooperation and what forms that cooperation might take depends on the extent to which the **cooperation criteria, as described in the legislative history, are met.**⁸ These criteria are respect for human rights and the democratic anchorage of the foreign service; the tasks, professionalism and reliability of the foreign service; the advisability of cooperation in the context of international commitments; enhancement of the performance of tasks and the degree of reciprocity (*quid pro quo*).

Under normal circumstances, according to the legislative history the head of the AIVD or MIVD must decide with which foreign services to cooperate as well as on the intensity of the cooperation. The Minister in question must be informed of the cooperation and, where high-risk foreign services are involved, the decision must be submitted to the Minister in advance. Cooperation with high-risk services can after all take on an additional dimension, given that human rights are an essential aspect of Dutch foreign policy, which then requires explicit political decision-making, according to the legislator.⁹

These cooperation criteria are currently **not explicitly included in the ISS Act 2002**. The CTIVD has extensively discussed these cooperation criteria in two previous review reports on cooperation between the AIVD and MIVD and foreign services.¹⁰ A brief description of each criterion mentioned in the legislative history will suffice here.

Respect for human rights and democratic anchorage

In the context of the respect for human rights criterion, it is possible to assess, for instance, whether the relevant state has ratified international human rights treaties and whether these human rights treaties are being observed in practice. Another important aspect is whether a foreign intelligence and/or security service is or has been associated with human rights violations. Whether a service is sufficiently democratically anchored depends on a number of factors, such as the overall political system of the state in question and the position of the service within that system, the legal powers of the service and (independent) oversight of it.

Professionalism and reliability

The extent to which a foreign intelligence and/or security service can be regarded as professional and reliable depends largely on the experiences gained by the AIVD and the MIVD through the cooperative relationship with the service in question. When entering into a cooperative relationship, views and experiences can be exchanged in this context with other (friendly) services, which can help when assessing whether a foreign service is professional and reliable. Moreover, the professionalism and reliability of a service are important factors when deciding whether or not to intensify a cooperative relationship. Compliance with the third-party rule by the foreign service plays an important role in this context.

⁸ *Appendix to the Proceedings II 2004/05*, no. 749 and *Parliamentary Documents II 1996/97*, 25 418, no. 1, p. 2. The legislative history of the ISS Act 2002 refers to this document: see *Parliamentary Documents II 2000/01*, 25 877 no. 14, p. 63.

⁹ *Parliamentary Documents II 1999/2000*, 25 877, no. 8, p. 102 and *Appendix to the Proceedings II 2004/05*, no. 749.

¹⁰ CTIVD Review Report no. 22a on the cooperation by GISS with foreign intelligence and/or security services, *Parliamentary Documents II 2009/10*, 29 924, no. 39 (appendix), available at www.ctivd.nl, p. 7-13; CTIVD Review Report no. 22b on the cooperation by DISS with foreign intelligence and/or security services, *Parliamentary Documents II 2014/15*, 29 924, no. 128 (appendix), available at www.ctivd.nl, legal appendix, p. 4-10.

Advisability in the context of international commitments

In this respect, the AIVD and MIVD must consider whether the cooperation is advisable or not based on Dutch foreign policy and international commitments arising, for example, from membership of an international organisation or international treaties ratified by the Netherlands. Legislative history shows that cooperation with certain foreign services can take on an additional dimension that requires explicit political decision-making. According to the legislator, it is imperative that such a situation be submitted to the relevant minister for a decision and is not to be assessed solely by the head of the AIVD or MIVD.¹¹

Enhancing the performance of tasks

When entering into and maintaining a cooperative relationship with a foreign service, the extent to which the cooperative relationship benefits or can benefit the performance of tasks by the AIVD or the MIVD must be examined.

Reciprocity

Cooperation with foreign intelligence and/or security services takes place according to the principle of *quid pro quo*, or reciprocity. This basic principle can be summarised as: "One good turn deserves another", and forms the basis for international cooperation.

3.2 Previous findings of the CTIVD

In previous review reports, the CTIVD described how the AIVD and MIVD assess whether foreign services qualify for cooperation. At the time, it assessed the policies of both services and evaluated their application in practice. The CTIVD expressed criticism of how a foreign service was assessed for compliance with the cooperation criteria. The reports are briefly discussed below in order of publication.

Review report on international cooperation by the AIVD (2009)

The review report (no. 22a) describes the legal framework for international cooperation and how this was implemented within the AIVD in policy and in practice. The CTIVD expressed criticism of the **lack of clear decision-making when entering into or intensifying cooperative relationships, among other aspects**. It observed that, in specific operational cases, the AIVD assesses whether a specific form of cooperation with a certain service is permissible in a certain situation.

The CTIVD pointed out that this ad hoc assessment alone is too limited and can have undesirable consequences. It was of the opinion that the AIVD should weigh up – for each foreign service with which it cooperates – the extent to which that service meets the criteria for cooperation. It also stated that the AIVD must justify which forms of cooperation are in principle permissible for each individual foreign service. According to the CTIVD, the AIVD must consider this aspect for each foreign service, based on the cooperation criteria. It recommended that the AIVD put in place a decision-making procedure for entering into or intensifying cooperative relationships with foreign services, in which the fundamental assessment of the extent to which the established cooperation criteria are met is carried out for each individual foreign service and at management level.¹²

The Minister of the Interior and Kingdom Relations endorsed the position of the CTIVD at the time but also made some comments on it. The Minister thought it conceivable that the AIVD could have a significant interest in short-term (operational) cooperation with a foreign service. The lack of a full assessment based on the cooperation criteria should not form an obstacle to this cooperation. The

¹¹ *Parliamentary Documents II* 1999/2000, 25 877, no. 8, p. 102.

¹² CTIVD Review Report no. 22a on the cooperation by GISS with foreign intelligence and/or security services, *Parliamentary Documents II* 2009/10, 29 924, no. 39 (appendix), available at www.ctivd.nl, p. 13-18.

Minister also indicated that it is excessive – for all services with which contacts are maintained – to define the boundaries of cooperation in advance in all cases. Foreign services that qualify, according to the prioritisation system, for a more or less intensive form of cooperation will be/are assessed based on the established criteria for cooperation. These cooperative relationships will also be evaluated (annually).¹³

Review report on the processing of telecommunications data (2014)

In review report no. 38, the CTIVD discussed cooperation with foreign intelligence and/or security services in the field of Sigint and the exchange of other data collections, for example web forums. The CTIVD noted that the ISS Act 2002 gives the AIVD and MIVD broad powers to cooperate with foreign services. When the ISS Act 2002 was created, no explicit consideration was given to how to handle the exchange of collections of (unevaluated) personal data. The CTIVD observed that the AIVD and MIVD can proceed with this exchange based on the ISS Act 2002 and that they do this in practice within various cooperative partnerships. This involves a far-reaching form of cooperation that takes place within close cooperative relationships among friendly services. According to the assessments of the AIVD and MIVD, these services meet the criteria for cooperation. Such relationships are based on a **high level of mutual trust**. In report no. 38 the CTIVD adopted the position that, in the light of the revelations of this period, it was advisable to **examine whether this trust is still justified**. Specifically, this meant that the heads of the AIVD and the MIVD, under the political responsibility of the Ministers in question, had to find out more about the **legal powers and (technical) possibilities** of foreign services so that **they could make justified assessments**. In this context, the CTIVD recommended that the Minister of the Interior and Kingdom Relations and the Minister of Defence **assess the cooperative relationships (including at international level) for transparency and further define the assessments underlying the cooperation**.¹⁴ In this context, transparency must be understood to mean the willingness of foreign services to provide a certain level of insight into their legal powers and (technical) possibilities and, if required, to further clarify the origin of data. The Ministers fully adopted the recommendation of the CTIVD.¹⁵

Review report on international cooperation by the MIVD (2015)

The legal annex to the review report (no. 22b) gives an extensive description of the legal framework for international cooperation. The CTIVD pointed out some bottlenecks in the legal framework. With regard to the cooperation criteria, the CTIVD asked the legislator to consider explicitly **including in the law that an assessment should be made based on these criteria** on whether and to what extent cooperation with a foreign service is authorised.¹⁶ The review report itself examines the question of how the legal framework has been implemented within the MIVD in terms of both policy and practice. The CTIVD noted that in May 2012 the MIVD adopted a policy for entering into, intensifying or limiting cooperative relationships with foreign services. A fundamental assessment must take place for each individual foreign service, at the level of the MIVD management, concerning whether the stated cooperation criteria are met and which forms of cooperation are permitted. The CTIVD observed that the **policy was not always applied in practice**.¹⁷ The Minister of Defence did not deal specifically with this issue in her response.¹⁸

¹³ *Parliamentary Documents II* 2009/10, 29 924, no. 39.

¹⁴ CTIVD Review Report no. 38 on the processing of telecommunications data by GISS and DISS, *Parliamentary Documents II* 2013/14, 29 924, no. 105 (appendix), available at www.ctivd.nl, section 5.1.

¹⁵ *Parliamentary Documents II* 2013/14, 29 924, no. 105.

¹⁶ CTIVD Review Report no. 22b on the cooperation by DISS with foreign intelligence and/or security services, *Parliamentary Documents II* 2014/15, 29 924, no. 128 (appendix), available at www.ctivd.nl, legal appendix, p. 4-10.

¹⁷ CTIVD Review Report no. 22b on the cooperation by DISS with foreign intelligence and/or security services, *Parliamentary Documents II* 2014/15, 29 924, no. 128 (appendix), available at www.ctivd.nl, sections 4.1 and 4.3.

¹⁸ *Parliamentary Documents II* 2014/15, 29 924, no. 128.

3.3 Cooperation criteria in the ISS 20XX Act Draft Bill

With reference to the report by the Dessens evaluation committee (2014)¹⁹ and with reference to Dutch House of Representatives motion no. 89, the cabinet promised to make a proposal for an amendment to the law in the field of international cooperation.²⁰ The cabinet indicated that the nature and intensity of cooperation with foreign intelligence and/or security services must be partly determined by certain cooperation criteria, such as respect for human rights and the democratic anchorage of a foreign service. The law must provide an adequate framework and scope for this. The cabinet indicated that this also includes the recommendation of the CTIVD in report no. 38 that cooperative relationships be assessed (including at international level) for transparency and that the assessments forming the basis of the cooperation be further defined.

Draft bill (2015)

Article 76 of the draft stipulates that an **assessment must take place regarding whether a cooperative relationship with a foreign service can be entered into and what the nature and intensity of the intended cooperation can be**. In any event, three cooperation criteria must be involved in this assessment: (1) **democratic anchorage**, (2) **respect for human rights** and (3) **professionalism and reliability**. The other cooperation criteria, including the legal powers and (technical) possibilities of the foreign service, are not explicitly included in the text of the draft bill.

The explanatory memorandum discusses the contents of the assessments that the services must make based on the three cooperation criteria above.²¹ These include various factors. In any event, the following questions must be answered:

- How are the general political order of the country in question and the position that the relevant service occupies within it, the legal powers of the service, and the (independent) oversight of the service organised?
- To what extent does this foreign service provide insight into its tasks, powers and procedure (this relates to the transparency of that service)?²²
- Has the country in question ratified human rights' treaties and are these treaties observed in practice?
- Is the foreign service associated with violations of human rights in investigations and reports by national and international human rights' organisations?
- What experiences have been gained in the past with this foreign service?
- What are the experiences of other foreign services with this foreign service?

It is also noted that specific operational interests with respect to the protection of national security interests by the services can also play an important role. This sometimes requires contacts with foreign services that do not meet the cooperation criteria. The explanatory memorandum makes it clear that, in the context of the assessment, the risks associated with potential cooperation must be identified. What the cooperation can involve (and cannot involve), for instance, must be determined. For example, regarding the topics on which data exchange can take place, the circumstances, and what other conditions must be fulfilled. The exchange of personal data deserves special attention in this respect.

¹⁹ Evaluation of the Intelligence and Security Services Act 2002, Towards a new balance between powers and safeguards, *Parliamentary Documents II* 2013/14, 33 820, no. 1, p. 117-119.

²⁰ *Proceedings II* 2013/14, no. 73, item 8, p. 23; *Parliamentary Documents II* 2013/14, 30 977, no. 104, p. 2.

²¹ Intelligence and Security Services Act 20XX Draft Bill, explanatory memorandum (consultation version, June 2015), published on 2 July 2015, pp. 136-140.

²² In its review report no. 38 regarding the processing of telecommunications data by GISS and DISS, the CTIVD recommended that cooperative relationships also be assessed for transparency.

The result of the assessment must answer the question of **whether a cooperative relationship can be entered into** and, if so, **how that cooperation is implemented and what preconditions apply**.

The draft bill also states that, if circumstances so require, the nature and intensity of the cooperative relationship with a foreign service must be re-assessed (Article 76 (5)). As an example, the explanatory memorandum refers to the situation where more and more insight is gained into the reliability and professionalism of a foreign service. This can lead to cooperation taking a more far-reaching form. This is a continuous process, where a change in circumstances makes a new assessment necessary.²³

The draft bill chooses to assign the authorisation to enter into a cooperative relationship with a foreign intelligence and/or security service to the Minister (Article 76 (4)). The power can be delegated to the head of service, who must then duly inform the Minister as soon as possible. The explanatory memorandum states that the authorisation to enter into cooperative relationships must in principle be given by the Minister himself, regardless of whether these are high-risk services or not.²⁴

CTIVD response (2015)

At the end of August 2015, at the request of both Ministers, the CTIVD gave its response to the draft bill.²⁵ It also formulated some areas of concern with regard to the rules for cooperation with foreign services.

The CTIVD believes it is important, in addition to the factors mentioned in the explanatory memorandum, that **safeguards in the field of data processing**, such as the storage and destruction of data by the receiving foreign service, must be considered. The importance of this lies primarily in the exchange of unevaluated data. The provision of this data is sensitive from the point of view of the protection of privacy because it has not yet been established whether that data is relevant with respect to the performance of the tasks of the AIVD or the MIVD. This data can include personal data that has no relevance to national security or is entirely unrelated to persons who are the subject of attention from the AIVD or MIVD. Moreover, unevaluated data often involves large quantities (bulk). These considerations mean that it is important, in the opinion of the CTIVD, that explicit attention be devoted to this when assessing the cooperation criteria.

Furthermore, the CTIVD sees it as an important safeguard that, in all cases, the **Minister himself should give authorisation for entering into a cooperative relationship**. This involves more than simply an agreement to enter into a new relationship – itself also an important consideration – but also involves the data that may be exchanged as part of that cooperation. This safeguard is undermined if authorisation can be delegated to the head of the service.

In line with this, the CTIVD noted that the draft bill does not require ministerial authorisation for the **provision of personal data** in individual cases.²⁶ The CTIVD is in favour of a thorough assessment being made upfront based on the cooperation criteria, which also serves as a framework for implementation of the relationship. It points out that, if the possibility of providing personal data to a foreign service that does not meet the cooperation criteria is left open in this prior assessment; it is left to the AIVD or MIVD to decide whether personal data can be provided in individual cases. In that case, only internal authorisation is required.

²³ Intelligence and Security Services Act 20XX Draft Bill, explanatory memorandum (consultation version, June 2015), p. 140.

²⁴ Intelligence and Security Services Act 20XX Draft Bill, explanatory memorandum (consultation version, June 2015), p. 140.

²⁵ Response of the CTIVD to the Intelligence and Security Services Act 20XX Draft Bill, available at www.ctivd.nl.

²⁶ At least as far as evaluated data is concerned. Authorisation from the Minister is required for the provision of unevaluated data (Article 49 (3) and Article 77 (2) of the draft bill).

Given the risks that can be involved in the provision of personal data to a foreign service that does not meet the cooperation criteria, the CTIVD believes that **additional safeguards are necessary**. Firstly, from the perspective of due care, this data should be provided exclusively in writing so that internal control and external oversight are possible. This also offers the possibility of including additional conditions when data is provided in writing, aimed at the use of the data (for example, the data may not be used in legal proceedings).

Secondly, the CTIVD finds the safeguard of ministerial authorisation appropriate, rather than internal authorisation each time personal data is provided to a foreign service that does not meet the cooperation criteria. In each case, an assessment should take place at ministerial level concerning whether the reason for the provision of the data outweighs the possibility of the possible consequences for the person in question. The nature of the data must be involved in this assessment and (if applicable) the type of human rights violations with which the foreign service is associated. Practical aspects are also relevant, such as whether the person involved is in the country in question or is expected to travel to that country. This assessment should be set forth in writing. The CTIVD is aware that it previously recommended assigning authorisation for the provision of personal data to foreign services that do not meet the cooperation criteria to the level of the head of service.²⁷ The reason authorisation is now being proposed at ministerial level is that it fits within the structure of the draft bill that ministerial authorisation be required when the provision of data to foreign services involves a higher risk than usual (for example, the provision of unevaluated data). This certainly also applies to the provision of personal data to foreign services that do not meet the cooperation criteria.

3.4 Case-law developments

On 6 October 2015 an important judgement was published by the Court of Justice of the European Union (CJEU) in the field of data protection (Schrems).²⁸ In a preliminary ruling, the Court further explained Directive 95/46. This directive concerns the protection of natural persons with respect to the processing of personal data and the free movement of that data. According to the directive, EU member states are only permitted to provide personal data to a third country if the third country provides safeguards, based on its domestic law or international commitments, for an adequate level of protection of that data.

The Court explains what must be understood by the concept of **adequate level of protection**. The Court states that the third country cannot be required to provide safeguards for the same level of protection as within the EU. However, based on its domestic law or international commitments, the third country must offer a level of protection of the fundamental rights and freedoms that **largely** corresponds with the level guaranteed within the EU. The means by which the third country can provide the safeguards for an adequate level of protection can differ from the means employed within the EU. Nonetheless, these means must in practice appear effective enough to provide an adequate level of protection.²⁹

The investigation into the level of protection provided by the third country must, according to the Court, focus on the **content of the rules applicable in that country**, as is evident from domestic law or international commitments, and on the **practice that must ensure compliance with those rules**.

²⁷ CTIVD Review Report no. 22a on the cooperation by GISS with foreign intelligence and/or security services, *Parliamentary Documents II* 2009/10, 29 924, no. 39 (appendix), available at www.ctivd.nl, p. 25-29.

²⁸ Court of Justice of the European Union (Grand Chamber), 6 October 2015, C-362/14 (Schrems v. Data Protection Commissioner), ECLI:EU:C:2015:650.

²⁹ Court of Justice of the European Union (Grand Chamber), 6 October 2015, C-362/14, ECLI:EU:C:2015:650, grounds 73 and 74.

Regular checks must also be performed to ensure that the level of protection can still be regarded as adequate, in any event when indications give rise to doubts in this regard.³⁰

The Court evaluated a decision of the European Commission in which it is established, among other things, that the level of protection provided in the third country in question, the United States, can be regarded as adequate.³¹ The Court reaches the conclusion that the assessment that an adequate level of protection exists is incorrect. One of the reasons for the Court to come to this conclusion, is that the decision leaves the United States room, on the grounds of national security for instance, to derogate from the system of data protection, seeing as American authorities can consult and further process personal data originating from the EU without it being established whether further limitations apply in this regard. The decision also fails to establish whether effective legal protection exists against such a derogation on grounds such as national security.³²

According to the Court, the European Commission's decision therefore makes interference with the fundamental rights of the persons whose personal data has been transferred from the EU to the United States possible. The level of protection within the EU requires that an arrangement that involves such interference with fundamental rights contains clear and precise rules concerning scope and application and imposes minimal requirements, so that guarantees of effective data protection are provided. The level of protection within the EU also requires that the exceptions to the protection of personal data and its limitations remain within the boundaries of what is absolutely necessary. Moreover, there must be an effective legal remedy against interference. Since the European Commission did not ascertain that the United States, under its domestic law or international commitments, actually provides safeguards for a level of legal protection largely in line with the above points, the requirement that an adequate level of protection be provided is not met.³³

Although this judgement by the Court of Justice of the European Union does not discuss the provision of personal data in the context of national security, which is after all a national, not an EU matter, the CTIVD nevertheless believes it is important to draw attention to this judgement. The Court formulates a general legal principle on the subject of data protection that serves as a safeguard for the protection of privacy. The judgement makes it clear that countries where the powers of government institutions exceed what is necessary in a democracy are not regarded as "safe harbours" for personal data and thus provides a framework.³⁴

The CTIVD believes it is important for the AIVD and MIVD to take this into account in their—cooperation criteria-based—assessment of whether personal data can (automatically) be provided to a foreign service. The system of data protection that applies to the service in question must be considered in the context of the assessment on the basis of the cooperation criteria.

³⁰ Court of Justice of the European Union (Grand Chamber), 6 October 2015, C-362/14, ECLI:EU:C:2015:650, grounds 75 and 76.

³¹ This assessment is laid down in Decision 2000/520 of the European Commission and relates to the level of data protection in the United States. Data protection is founded on a system of self-certification, based on "Safe Harbour Privacy Principles".

³² Court of Justice of the European Union (Grand Chamber), 6 October 2015, C-362/14, ECLI:EU:C:2015:650, grounds 79-90.

³³ Court of Justice of the European Union (Grand Chamber), 6 October 2015, C-362/14, ECLI:EU:C:2015:650, grounds 91-98.

³⁴ On 29 February 2016 it became known that the European Commission and the United States had reached new agreements concerning the protection of personal data, to be set forth in the "EU-US Privacy Shield". The final result of this can influence the content and significance of assessment on the basis of the cooperation criteria.

3.5 Conclusion: the weighting note as a safeguard

The legislator found it important for the AIVD and MIVD, before entering into a cooperative relationship, to first to assess whether a foreign service qualifies for cooperation. The assessments that are made are recorded by the services in a **weighting note** and must form the **framework for the cooperative relationship**. This assessment forms a basis for the trust placed by the AIVD or MIVD in the foreign service: trust that the counterpart complies with the legislation and regulations applicable to that service and abides by the agreements made in the cooperative relationship in general and in individual cases. Through assessment on the basis of the cooperation criteria, **trust** acquires a **clear and transparent basis**.

The assessment on the basis of the cooperation criteria must provide an insight into the boundaries of the trust that can be placed in the foreign service. Based on the assessment of the cooperation criteria, the nature and intensity of the cooperation must be defined. Any risks that can be associated with the cooperation must be named and weighted. In case of changes, or if there are indications that the trust placed in the foreign service is unjustified, a new assessment must be made and the considerations involved must, if necessary, be adjusted.

The general assessment of whether a foreign service qualifies for cooperation forms an important **safeguard for the protection of privacy**. In each individual case of cooperation, for example, the provision of certain data or the deployment of an investigatory power in assistance to a foreign service, the AIVD and MIVD must assess whether the requirements of necessity, proportionality and subsidiarity are met. This must be tested against the general assessment of how a foreign service uses its powers and the estimate of whether this can be trusted. Therefore, a two-fold assessment must take place in every individual case:

- does it fit within the limits of cooperation, as defined in the weighting note?
- in that context, does it meet the requirements of necessity, proportionality and subsidiarity?

Where risks are present in individual cases of cooperation, the general assessment on the basis of the cooperation criteria is the most relevant. This is the case, for example, when the AIVD or MIVD wants to provide certain personal data to a foreign service that does not meet the cooperation criteria and must assess whether operational importance carries more weight than the potential consequences of providing the data of the person in question or, in the event that unevaluated data is provided to a foreign service, because it is not clear exactly what data is being provided.³⁵ Another example relates to the situation where, when data is provided, there is a risk that the data could contribute to unlawful targeting by the foreign service.³⁶ The weighting notes substantiate, in a balanced and well-reasoned manner, which fields of cooperation can potentially involve risks and under what circumstances cooperation is permitted. In each individual case, the AIVD and MIVD must assess whether the risks cited in the weighting note are present and, if so, which compelling (operational) conditions would still lead to provision of data or assistance to the foreign service. The assessment on the basis of the cooperation criteria thus forms the basis for being able to take justified risks in the cooperative relationship.

The assessment on the basis of the cooperation criteria therefore **provides a framework**. It is an important safeguard for the protection of privacy and is therefore **essential** in order to cooperate

³⁵ In this context, see the corresponding review report no. 49 on the execution of Dutch House of Representatives motion no. 96 by the AIVD and MIVD, adopted on 4 May 2016, published simultaneously. The review report examines the exchange of unevaluated data.

³⁶ In this context, see the review report on contributions of the MIVD to targeting, to be published. That report further examines the two-fold assessment (in general/in individual cases) that has to be made before data that could possibly contribute to targeting is provided to foreign services.

lawfully with foreign services, particularly foreign services that do not meet the cooperation criteria. The weighting note must define the limits of cooperation with the foreign service.

The weighting notes must show:

- to what extent the foreign service meets the criteria of respect for human rights, democratic anchorage, professionalism and reliability;
- that the foreign policy and international commitments of the Netherlands have been taken into account and that the enhancement of the performance of tasks of the AIVD or MIVD and a balance in the cooperative relationship are being sought;
- that the AIVD or MIVD has made sufficient efforts to identify the legal powers and (technical) possibilities of the foreign service and the level of data protection offered.

Based on the weighting of these cooperation criteria, the following must be indicated:

- what risks the cooperation can involve;
- which forms of cooperation, including the exchange of personal data and unevaluated data, are permitted and under what conditions.

4 Policy and practice within the AIVD

4.1 Policy within the AIVD

In report no. 22a (2009) the CTIVD found that the AIVD had not developed any decision-making procedure to apply before entering into or intensifying cooperative relationships with foreign intelligence and/or security services. Assessments for entering into a cooperative relationship were often not made by the AIVD in a general way or only to a limited extent. Decision-making on the possibilities for launching cooperative relationships with foreign services did not take place in a structured way for each foreign service. The CTIVD recommended that the AIVD provide for a decision-making procedure for entering into or intensifying cooperative relationships with foreign services. This must include the basic assessment of the extent to which the cooperation criteria are met, for each individual foreign service and at management level.³⁷

Since the previous investigation of cooperation with foreign services, the AIVD has repeatedly adopted new policy for cooperation with foreign services. The main aspects of the current policy are discussed below.

Policy framework for international cooperation (2014)

The internal policy of the AIVD³⁸ states that prior to cooperation with foreign services, it is necessary to assess whether the foreign service in question qualifies for cooperation. The criteria involved in this are the cooperation criteria derived from legislative history (section 3.1). If a foreign service qualifies for cooperation, it is necessary to determine what level of cooperation is permitted. The AIVD makes a **distinction between protocol-based, analytical and operational cooperation**. This means, respectively, maintaining contacts (protocol-based), the exchange of data that provides an insight into the current level of knowledge of the service (analytical) and forms of cooperation that provide insights into the methods or sources of the service or where the provision of personal data is involved (operational). A thorough assessment must also be made when the cooperative relationship is intensified or modified. The scope and intensity of the cooperation is stipulated in a weighting note. This must indicate the boundaries of the cooperation. The cooperative relationships must be evaluated annually.

An assessment must be made, based on the weighting of cooperation criteria, as to whether a foreign service **is or is not high-risk**. A high-risk service does not adequately meet the criteria of respect for human rights and democratic anchorage. Cooperation over the entire range can take place with services that are not high-risk. With services that are high-risk, protocol-based cooperation can take place in any event. Analytical cooperation is possible if the foreign service meets the criterion of professionalism and reliability. Operational cooperation with high-risk services is only possible in individual cases, if the (operational) **importance of the cooperation outweighs the associated risks**. The director-general of the AIVD can choose to include operational cooperation in the weighting note with respect to a specific topic, when a structurally compelling interest in operational cooperation with a high-risk service exists. **The director-general of the AIVD decides whether it is necessary to submit the conclusion of the weighting note regarding a high-risk service to the Minister of the Interior and Kingdom Relations.**

³⁷ CTIVD Review Report no. 22a on the cooperation by GISS with foreign intelligence and/or security services, *Parliamentary Documents II* 2009/10, 29 924, no. 39 (appendix), available at www.ctivd.nl, section 6.1.

³⁸ The most recent policy framework for cooperation with foreign services was adopted by the management of the AIVD in January 2014.

The decision-making power concerning protocol-based and analytical cooperation that fits within the boundaries of the weighting note concerning the foreign service in question rests with the head of team. Decisions on operational cooperation within the boundaries of the weighting note must be made by the head of unit. When a foreign service is involved and the boundaries of the cooperation have not (yet) been established, authorisation must be requested from the director-general of the AIVD. If the intended cooperation falls outside the boundaries of the weighting note, in other words is not permitted according to the weighting note, the decision-making power concerning that cooperation also lies with the director-general of the AIVD. He determines whether the Minister of the Interior and Kingdom Relations must be informed of the decision. The policy states that it can be necessary to do this where high-risk services are involved, when cooperation takes on an additional dimension that explicitly requires political decision-making.

Policy framework for provision of personal data (2013)

The distinction between high-risk foreign services and those that are not high-risk is also important for the provision of personal data. The internal policy of the AIVD³⁹ (2013) states that personal data can in principle be provided to services that are not high-risk. If the service is high-risk, personal data may only be provided in an individual case if the **operational importance** of such provision **outweighs the risk** that it will lead to a violation of human rights.

When determining *which* personal data can be provided, an assessment of necessity, proportionality and subsidiarity must take place, pursuant to the policy. Moreover, this assessment must be made in all cases, even if the data is being provided to a foreign service that is not high-risk. Furthermore, the provision of the personal data, any conditions attached to such provision and the assessment prior to the provision must be laid down in writing.

The head of team has the decision-making power for the provision of personal data to non-high-risk services in an individual case. He must inform the head of unit of his decision. The decision to provide personal data in an individual case to foreign services that are regarded as high-risk must be made by a director.

This policy does not seem to correspond with the policy framework for international cooperation. In that policy framework, the provision of personal data is categorized as operational cooperation. With regard to operational cooperation in a specific joint operation, the head of unit (within the boundaries) or the director-general of the AIVD (outside the boundaries) is competent. The CTIVD wonders who must give authorisation if the weighting note states that, under certain circumstances, personal data can be provided to a high-risk service. According to one policy framework, this would be a director, while according to the other policy framework it would be a head of unit.

In his response to the drafted review report, the Minister of the Interior and Kingdom Relations indicated that the policy for providing personal data in an individual case to foreign services that do not meet the cooperation criteria will be clarified. The required authorisation will be assigned to the director-general of the AIVD. In this context, a difference exists with the MIVD. The Minister of Defence indicated that the policy of the MIVD prescribes ministerial authorisation for this (see section 5.1).

³⁹ The most recent policy framework for the provision of personal data was adopted by the management of the AIVD in June 2013.

Prioritisation of foreign services (2009-2015)

Since 2009, new priorities have repeatedly been set within the AIVD regarding the foreign intelligence and/or security services for which weighting notes should (first) be drafted. The AIVD has divided the foreign services with which it cooperates into **structural cooperative partners**, **potential cooperative partners** and **other foreign services**. Structural cooperative partners are foreign services with which the AIVD cooperates frequently and intensively and which make a structurally important contribution to the work of the AIVD. Potential cooperative partners are selected based on strategic considerations and flagged opportunities and possibilities in the cooperation. At the end of 2014, the category of **special cooperative partners** was added. Special cooperative partners are foreign services with which cooperation takes place as a result of special circumstances, for example because of a temporary investigation or event. The AIVD has decided that, for cooperation with structural and potential partners, weighting notes must in any case be drafted. This involves approximately thirty foreign services. With respect to other foreign services, internal policy states that it is sufficient to collect information so that, if necessary, a weighting note (accelerated version) can be produced. At the beginning of 2015, it was established that, in addition to the (intended) intensity of the cooperation, other factors also play a role in prioritisation for the drafting or updating of weighting notes, such as public attention or the presence of an AIVD liaison post in the country in question. During the investigation, the AIVD indicated to the CTIVD that the service intends to draw up weighting notes relating to all foreign services with which cooperation exceeds the protocol-based level.

Template for weighting notes (2014)

In November 2014, the management of the AIVD adopted a template for the weighting notes to be drawn up. The template was created **in consultation with the MIVD**. All newly created **weighting notes must be drawn up based on this template**. In addition to more general data about the country and foreign service in question, information must be included on the extent to which the cooperation criteria are met. For instance, the following questions must be answered:

- Has the country in question ratified human rights' treaties and are these treaties observed in practice? Are human rights respected by the service in question? (Human rights)
- What position does the service occupy within the political order? Is the service answerable to the parliament? (Democratic anchorage)
- Does the service abide by its agreements? Does the service observe the third party rule? (Professionalism and reliability)

In order to implement the promise made by the Minister of the Interior and Kingdom Relations and the Minister of Defence that the services will find out more about the legal powers and (technical) possibilities of foreign services with which close cooperative relationships exist (see section 3.2), the template also includes a legal section. Questions that have to be answered here, according to the template, include:

- What is the legal and judicial framework of the service?
- What potential executive powers does the service have?
- Does independent oversight exist?
- Is there a control mechanism in place for the service?

Based on the assessment of whether the foreign service adequately meets the criteria for cooperation, the template must be used to determine which forms of cooperation are permitted: protocol-based, analytical or operational cooperation. Any applicable limitations must be indicated separately for the exchange of personal data.

The **level of data protection** by the foreign service is not named as a criterion in the template for weighting notes. The possibility of exchanging **unevaluated data** is also not included as a (separate) component in the template.

It was clear to the CTIVD that it took quite some time to coordinate this template. The templates adopted by the AIVD and the MIVD barely differ from one another in substantive terms. The most important difference is that the MIVD's template includes an additional section for a summary of the cooperative agreements that are applicable to the cooperative relationship, whereas it is not customary for the AIVD to work with cooperative agreements. For this reason, this section was not deemed relevant.

The CTIVD notes that, in mid-2015, the MIVD decided to change the template that had been coordinated with the AIVD. The MIVD's grounds for this lay in the recommendations of the CTIVD in report 22b, which was published shortly beforehand. The MIVD chose a somewhat different structure and explicitly explained the cooperation criteria in the weighting notes. The MIVD also added an authorisation structure in order to indicate at which level authorisation must be obtained for the various activities that can be carried out within the cooperation.

The MIVD submitted the changes to the template to the AIVD. The AIVD decided not to pursue the changes for the time being because it had just begun drawing up a number of weighting notes. During the investigation, the AIVD indicated that it would consider the MIVD's changes at a later date and would work towards coordination in this area.

Conclusions on the AIVD's policy

In motion no. 89, the Dutch House of Representatives requested the government to pursue more detailed implementation of the cooperation criteria. It is up to the Dutch House of Representatives to assess whether the policy of the AIVD adequately does this. The CTIVD provides the following guidelines for this.

The CTIVD finds that the **policy of the AIVD** for assessing whether a foreign service (still) qualifies for cooperation is **in line with the current regulation, as defined in the currently applicable ISS Act 2002**. The ISS Act 2002 and the legislative history of this act require that the AIVD determine, based on the cooperation criteria, whether a foreign service qualifies for cooperation. The policy of the AIVD regulates how and on the basis of which considerations the assessment, based on the cooperation criteria, must be made.

When the CTIVD incorporates into its assessment (1) its conclusions and recommendations from previous review reports, (2) the promises made by the Minister of the Interior and Kingdom Relations to the Dutch House of Representatives in response to the recommendations of the CTIVD and in response to motion no. 89, (3) the cabinet's position as laid down in the draft bill for a new ISS Act and (4) case-law developments in the field of data protection, it reaches additional conclusions:

- One aspect of the AIVD's policy is **not entirely in line with the promises made by the Minister**. It is left up to the director-general of the AIVD to decide in which cases he submits the conclusion of a weighting note to the Minister of the Interior and Kingdom Relations. The policy states that it can be necessary to do this where high-risk services are involved. According to the policy, this is the case when cooperation has an additional dimension that explicitly requires political decision-making. By high-risk services, the AIVD means foreign services that do not meet the criteria of respect for human rights and democratic anchorage. The Minister of the Interior and Kingdom Relations has indicated to the Dutch House of Representatives that **his authorisation for cooperation must be given for services that do not meet all the criteria according to the weighting note.**⁴⁰ The Minister does not limit this to what the AIVD characterises as high-risk services – foreign services that do not meet the criteria of respect for human rights and democratic anchorage – but extends it to all cooperation criteria.

⁴⁰ *Parliamentary Documents II* 2013/14, 33 820, no. 4, p. 6; *Proceedings II* 2013/14, no. 73, item 8, p. 23.

- The policy relating to the **provision of personal data** to a foreign service that does not meet the cooperation criteria **creates confusion** in terms of the **authorisation level**. The CTIVD believes it important for the AIVD to follow one clear line. It is of the opinion that, where personal data is provided in an individual case to a foreign service that does not meet all the cooperation criteria, authorisation must be granted at least at the level of the director-general of the AIVD.⁴¹ In this context, the CTIVD recommended that the level of authorisation for the provision of personal data to a foreign service that does not meet the cooperation criteria in the new ISS Act 20XX be raised to the level of the Minister (see section 3.3). In his response to the drafted review report, the Minister of the Interior and Kingdom Relations indicated that the policy for the provision of personal data to foreign services that do not meet the cooperation criteria will be clarified. The required authorisation will be being assigned to the director-general of the AIVD. In this context, a difference exists with the MIVD. The Minister of Defence has indicated that the MIVD's policy prescribes ministerial authorisation in this case.
- The policy incorrectly does not discuss **exchange of unevaluated data**, nor is the possibility of exchanging unevaluated data included in the template as a separate component. In line with review report no. 38 and the political debate on interception by the NSA and the role of the Netherlands in that activity, the CTIVD believes it is important for the AIVD, in anticipation of a possible change to the law, to adopt a policy in this area. The CTIVD discusses this subject extensively in its review report on the implementation of Dutch House of Representatives motion no. 96.⁴²
- The **level of data protection** provided by the foreign service is incorrectly not cited as a criterion in the template for weighting notes. In connection with the exchange of personal data and of unevaluated data, it is important for this to be mapped out on the basis of the contents of the rules applicable to the service in question, as these are evident from domestic law or international commitments, and on the basis of practice that must ensure compliance with those rules. In that context, attention must also be devoted to the **safeguards in the field of data processing**, such as the storage and destruction of data.

Application of the policy depends entirely on the adoption of **adequate weighting notes**. On the one hand, the weighting notes must provide sufficient information. They must examine the powers and possibilities of the foreign service and the level of data protection offered and provide an insight into the way in which the other criteria for cooperation are met. On the other hand, based on this information, a thorough assessment must be made of where potential risks can occur and what forms of cooperation are permitted in which cases and under which circumstances. How this has been implemented in practice is discussed in section 4.2.

4.2 AIVD weighting notes

In the previous investigation into cooperation between the AIVD and foreign intelligence and/or security services, the CTIVD examined how and on what grounds decisions to enter into or further develop a cooperative relationship are made in practice within the AIVD. The CTIVD found at the time that assessments in this context were often not made in a general sense or only to a limited extent. The AIVD inadequately assessed the extent to which foreign services meet the criteria for cooperation and, in that respect, the scope and intensity of the permitted cooperation.

⁴¹ See also CTIVD Review Report no. 22a on the cooperation by GISS with foreign intelligence and/or security services, *Parliamentary Documents II* 2009/10, 29 924, no. 39 (appendix), available at www.ctivd.nl, p. 25-29.

⁴² Review report no. 49, adopted on 4 May 2016, will be published simultaneously.

The most important developments with regard to the adoption of weighting notes since the previous CTIVD investigation (Review Report 22a, 2009), are discussed below.

Developments since report 22a (2009-2014)

In October 2010, the management of the AIVD approved a **phased plan** for achieving an **assessment and prioritisation of cooperation with foreign services**. The phased plan was developed by the Foreign Relations department. In brief, its phases include collecting information from the teams and departments within the AIVD, describing the strategic objectives and operational wishes and opportunities in cooperation with foreign services and describing the degree to which the foreign services meet the criteria for cooperation. All these factors together result in a recommendation on whether cooperation will take place and up to which level.

In June 2011, the Foreign Relations department indicated that the phased plan had largely been completed for the most important cooperative partners. The last phase, the assessment based on the cooperation criteria, had yet to take place. A list was presented to the management of the AIVD of foreign services that, according to an updated prioritisation, must be assessed first. The list was compiled by the management. It contained a total of 29 foreign services. The Foreign Relations department indicated that this involved both high-risk foreign services and non-high risk services that are characterised as structural and potential cooperative partners.⁴³

In November 2011, an updated prioritisation was presented to the management of the AIVD. The phased plan had been completed for the 29 foreign services, with the exception of the assessment based on the cooperation criteria. A working process and a template had been developed for drawing up the weighting notes. The Foreign Relations department intended to finish the weighting notes for the 29 foreign services by the end of 2011. Following these proposals, the management of the AIVD asked for clear internal procedures and deadlines so that the responsibilities and process steps are clear to all parties involved.

In response to this, in February 2012 the Foreign Relations department submitted a procedure that must be completed when a new need for cooperation arises within a team. The procedure states, among other things, that a proposal for cooperation must be written if the need for cooperation deviates from the existing prioritisation and does not fit within the boundaries of the weighting note. The starting point for the procedure is the existence of weighting notes. No further details were given regarding the process of drawing up these notes. In connection with this procedure, the AIVD worked on the international cooperation policy framework, which is currently the applicable framework within the AIVD (see section 4.1).

The **result of these developments** is that, since the publication of report no. 22a, **weighting notes** have been drawn up relating to **ten foreign services**.⁴⁴ These are primarily foreign services that are characterised by the AIVD as high-risk. The notes differ in form and depth and do not have a clear status in all cases. Furthermore, when the policy framework for international cooperation is adopted, this states with respect to thirty foreign services, whether the service is high-risk or not. High-risk means, according to the policy of the AIVD, that the foreign service does not meet the criteria of respect for human rights and democratic anchorage. This classification is, in many cases, not based on a supporting weighting note.

⁴³ Structural cooperative partners are foreign services with which the AIVD cooperates frequently and intensively and which make a structurally important contribution to the work of the AIVD. Potential cooperative partners are selected based on strategic considerations and flagged opportunities and possibilities in the cooperation.

⁴⁴ Weighting notes that relate to cooperation with foreign services in the context of security investigations are not included since we are dealing here with a highly specific form of cooperation.

The weighting notes were written within the AIVD during the period before Dutch House of Representatives motion no. 89 was adopted in April 2014. Some of them are currently being updated (see below). For this reason, the CTIVD has **not substantively reviewed** the weighting notes. The CTIVD has however investigated, on the basis of a limited random sample, whether the contents of the weighting notes are taken into account in proposals for entering into certain forms of cooperation in specific cases. To this end, the CTIVD has looked at ten internal notes from after April 2014, in which authorisation is requested to share personal data or to enter into operational cooperation with services for which weighting notes have been drawn up. **None** of these proposals refers to the contents of the weighting notes. Operational considerations are however given attention and, in some cases, attention is devoted to the potential risks of the cooperation. The CTIVD did not investigate which decisions were taken in these specific cases and to what extent the AIVD generally remains within the boundaries of the weighting notes in its cooperation with foreign services. This requires more detailed investigation.⁴⁵

Weighting notes project (2015)

At the beginning of 2015, the AIVD **launched a project with regard to the creation of weighting notes**. In so doing, the AIVD intended to lend weight to the weighting process that must take place in the context of international cooperation. The project plan states that the creation and updating of weighting notes is not yet fully embedded in the working processes of the AIVD. Partly because of the lack of a permanently defined structure, according to the project plan, more foreign services are still “not weighted” as opposed to “weighted”. The project aims on the one hand to embed both the preparation and use of weighting notes into the working processes of the AIVD. On the other hand, the project focuses on the actual delivery of new or updated weighting notes. The project plan also establishes a new list of around twenty foreign services for which weighting notes are being drafted as a priority. Some of the weighting notes that were drafted before motion no. 89 was adopted are included in the priority list.

The AIVD explained that the starting point is that the weighting notes are created with regard to all foreign services with which cooperation takes place. Previously, the focus was mainly on high-risk services. It became evident from the Snowden case that major developments can take place even with regard to services that are not high-risk, which can influence the cooperative relationship. The AIVD has indicated, in line with this, that it has chosen (in joint consultation with the MIVD) to devote more attention in the weighting notes to the legal framework that applies to the foreign service in question. However, this framework will not be detailed for every foreign service. The AIVD has indicated that this will take place if it is necessary in order to be able to make sound assessments within the context of cooperation with the foreign service in question.

The AIVD further explained that the weighting note must not be seen as an end in itself, but as a means to make it clear that cooperation with foreign services must be handled in a conscious manner. According to the AIVD, the weighting note does not draw definite lines, but it describes areas of concern and experiences and consists of open conclusions. The result of the weighting determines whether a service is high-risk and determines the boundaries of the cooperation. In a specific case, for example the provision of personal data, an assessment must always still be made as to whether, in the circumstances of that case, cooperation is permitted.

In June 2015, **three draft weighting notes** were submitted to the management of the AIVD. They concern foreign services with which cooperation has taken place over a longer period and which are not characterised by the AIVD as high-risk services. The management of the AIVD noted that the weighting

⁴⁵ Further investigation into this topic is taking place in the ongoing investigation into the exchange of data by the AIVD with respect to (alleged) foreign terrorist fighters.

notes were due for some additions and needed tightening up. Some coordination with the MIVD was also required. These weighting notes are now being modified and have not yet been resubmitted.

In October 2015, in the context of the aforementioned project, **fourteen other draft weighting notes** were drawn up. They relate to foreign services with which the AIVD has already developed a certain form of cooperation, some more intensive than others. An accompanying note to the weighting notes indicates that these foreign services do not meet the criteria of democratic anchorage and respect for human rights. They are therefore high-risk services, according to the policy of the AIVD. The fourteen draft weighting notes have not yet been assessed or adopted by the management of the AIVD as of the end of the investigation.

At the time of the conclusion of the investigation by the CTIVD, the weighting notes project had not yet been completed. The AIVD has indicated that a **proposal for an internal working process** will be made **to the management** in the first half of 2016, so that **drawing up weighting notes and keeping them up to date** can be embedded into the structure of the AIVD.

Distribution of tasks with the MIVD

It was clear to the CTIVD from its investigation that the AIVD and MIVD have **not chosen to adopt each other's weighting notes and to agree mutually on a distribution of tasks**. Both services have indicated that they do not regard such a procedure as advisable. The AIVD and MIVD cooperate with foreign services in different ways and in different fields. The value that is attached to the cooperative relationship also differs. For these reasons, it is seen as important for each service to make its own assessment. Coordination does take place between the AIVD and MIVD with respect to the more factual information in the weighting notes. However, a distribution of tasks has been agreed with respect to some foreign services. This relates to foreign services with which cooperation takes place exclusively through the Joint Sigint and Cyber Unit (JSCU) and not through other departments within the AIVD and MIVD. The JSCU is a joint unit of the AIVD and MIVD that operates in the field of Sigint and Cyber.

The CTIVD established that the AIVD and MIVD **regularly consult one another** on cooperation with foreign services, including at the level of the heads of the Foreign Relations department (AIVD) and the External Relations bureau (MIVD). During these consultations, all kinds of practical and policy-related matters are coordinated. The AIVD and the MIVD have indicated that, in 2016, they will jointly evaluate the recently created weighting notes and the process underlying them.

Conclusions on the creation of weighting notes by the AIVD

The CTIVD notes that, until early 2015, the AIVD gave **little priority to the creation of weighting notes**. Within the AIVD, various developments have taken place since the previous CTIVD investigation into cooperation with foreign services (2009). The preparation of weighting notes has always been part of a broader (policy-related) plan. The result of these developments is that, since the publication of report no. 22a, weighting notes have been prepared with regard to ten foreign services. These are primarily foreign services that are characterised by the AIVD as high-risk. The weighting notes were written within the AIVD during the period before Dutch House of Representatives motion no. 89 was adopted in April 2014. Some of them are currently being updated. For this reason, the CTIVD has not substantively reviewed the weighting notes.

At the beginning of 2015 the AIVD launched the weighting notes project. The project aims, on the one hand, to embed the creation and use of weighting notes into the working processes of the AIVD. On the other hand, the project focuses on the actual delivery of new or updated weighting notes. At the time of the conclusion of the investigation by the CTIVD, the project had not yet been completed. The AIVD has indicated that a proposal will be made to the management in the first half of 2016 for an internal working process for the purpose of drawing up weighting notes and keeping them up to date.

The CTIVD finds that, in June 2015, three draft weighting notes were submitted to the management of the AIVD. These draft weighting notes are currently being rewritten because, according to the management, they required some additions and needed tightening up. In October 2015, fourteen other draft weighting notes were drawn up. These weighting notes have not yet been assessed by the management of the AIVD. The fourteen draft weighting notes relate to foreign services with which the AIVD has already developed a certain form of cooperation, some more intensive than others. The CTIVD has chosen to communicate its **findings concerning the seventeen draft weighting notes in a letter to the Minister of the Interior and Kingdom Relations**. It makes some comments about the quantity and depth of the information included in the draft weighting notes and about the assessment based on them regarding whether the cooperation criteria are met. It also notes that some basic information is missing. Furthermore, the CTIVD has questions about the way in which the policy framework for international cooperation of the AIVD is applied in assessing which forms of cooperation are permitted based on weighting of the cooperation criteria.

The CTIVD notes that coordination takes place with the MIVD.

5 Policy and practice within the MIVD

5.1 Policy within the MIVD

In review report 22b on cooperation between the MIVD and foreign intelligence and/or security services (2015), the CTIVD reported that the MIVD has formulated a policy for assessing whether a foreign service qualifies for cooperation. Looking back, the CTIVD found that in May 2012 the management of the MIVD agreed to a proposal from the External Relations bureau. The proposal broadly outlines a methodology. For each foreign service, a weighting note is drawn up, which considers whether cooperation is advisable, which forms of cooperation are possible and what conditions apply to the cooperation. The weighting note must make clear to what extent a foreign service meets the cooperation criteria and what this means for the way in which the MIVD can cooperate with this service. The weighting note is submitted to the management of the MIVD for approval. The methodology would be further developed by a working group consisting of representatives of the relevant departments, the External Relations bureau and the legal service of the MIVD.

The MIVD has adopted a new policy since 2012. This is discussed in general terms below.

Weighting notes as part of strategic relationship management (2013)

In September 2013, the MIVD adopted a policy for the execution of **strategic relationship management**. This is understood to mean identifying partner services that are crucial to the performance of the tasks of the MIVD and optimising the relationship with these foreign services. Under the policy, a weighting note must be drafted and maintained for each of these foreign services. **The weighting notes must clarify all relevant and current information about the relationship between the MIVD and the foreign service.** For instance, this concerns the goals identified by the MIVD, the current state of affairs and a rating of the cooperative relationship. Furthermore, the policy states that attention must be paid to the way in which human rights are handled; democratic anchorage and the tasks and powers of the foreign service are also covered. At the end of 2013, fourteen foreign services were named as strategic partner services by the MIVD, for which weighting notes must in any event be drafted. Over the course of 2014 and 2015, four foreign services were added to this list. Apart from rendering accountability, the weighting notes will also be used to steer the cooperative relationship.

In October 2013, the MIVD adopted a plan for drawing up weighting notes with regard to foreign intelligence and/or security services that are not characterised as strategic partners. The starting point for this was that **weighting notes concerning new cooperative relationships and foreign services with which operational and intensive cooperation takes place take a higher priority.** Furthermore, it is not necessary to draft weighting notes for EU member states or NATO partners, since the MIVD can assume that certain standards are met by services from these countries, based on EU and NATO membership. The total number of weighting notes that have to be drafted for the other foreign services is approximately thirty. The MIVD has indicated that the stated starting points have now been revised, partly following the developments surrounding the Snowden case and the recommendations of the CTIVD in review report no. 38. The line is now that, for all foreign services with which cooperation takes place, a weighting note must be drawn up.

Template for weighting notes (2014)

In December 2014, the management of the MIVD adopted a template for future weighting notes. The template was created **in coordination with the AIVD** (see also section 4.1). An accompanying note to the template indicates that the legal framework of the foreign service is now also a component of the template. Attention must be given to the legal rules in the country in question, the executive powers of the foreign service, the mutual agreements relating to the use of the information provided, the system of legal protection and the agreements on the provision of data. With this approach, the legal departments of the MIVD and AIVD expect to be able to adequately implement the recommendations of the CTIVD in report 38 and the promises made by the Ministers in question in their response to the report and in their response to Dutch House of Representatives motion no. 89, among other things.

All newly created **weighting notes must be implemented in line with this template**. In addition to more general data about the country and foreign service in question, information must be included on the extent to which the cooperation criteria are met. On this basis, the permitted forms of cooperation must be assessed: protocol-based, analytical or operational cooperation. Any applicable limitations for the exchange of personal data must be indicated separately.

The **level of data protection** by the foreign service is not named as a criterion in the template for weighting notes. The possibility of exchanging **unevaluated data** is also not included as a (separate) component in the template.

It was clear to the CTIVD that it took quite some time to coordinate this template. The templates that were adopted by each service scarcely differ from one another in terms of content. The most important difference is that the MIVD's template includes an additional section for a summary of the cooperative agreements that are applicable to the cooperative relationship. It is not customary for the AIVD to work with cooperative agreements and this section was not deemed relevant.

The CTIVD notes that, in mid-2015, the MIVD decided to change the template that had been coordinated with the AIVD. The MIVD's grounds for this lay in the recommendations of the CTIVD in report 22b, which was published shortly beforehand. The MIVD chose a somewhat different structure and explicitly explained the cooperation criteria in the weighting notes. The MIVD also added an authorisation structure in order to indicate at which level authorisation must be obtained for the various activities that can take place within the cooperation.

The MIVD submitted the changes to the template to the AIVD. The AIVD decided not to pursue the changes for the time being because it had just begun drawing up a number of weighting notes. The AIVD has indicated that it will consider the changes from the MIVD at a later date and will work towards coordination in this field.

Policy framework for international cooperation (2015)

In September 2015, the management of the MIVD approved a policy framework for international cooperation. A few points of the policy framework were modified in January 2016 and the framework was definitively adopted. The policy aims to clarify **how to determine when cooperation can be entered into, how this must be weighted and established and how the associated decisions are made**. Prior to cooperation with a foreign service, the policy states that a weighting note must be drafted. The weighting note must include **whether and, if so, to what extent the service in question meets the cooperation criteria**.

It must also describe the topics of cooperation, the strengths and weaknesses of the foreign service and the authorisation framework. According to the policy, the weighting notes must be **re-assessed at least once every two years**. Earlier modification of a weighting note can be dictated by a change to the cooperation, a change to the cooperation criteria or political decisions that influence the weighting. Furthermore, the policy framework indicates that when creating the weighting notes, as much coordination as possible must be sought with the AIVD.

The policy further examines the legal provisions that apply to cooperation with foreign services and to the **structure of powers** that applies within the MIVD for the various forms of cooperation. The head of department is authorised to give authorisation for forms of cooperation that take place in the context of the performance of the service's own tasks, including the provision of personal data of persons who are not of Dutch nationality. The director of the MIVD must give authorisation for forms of cooperation that take place exclusively in the interests of the foreign service. Decisions concerning the provision of personal data in the interests of the foreign service, the provision of personal data of Dutch citizens and the forwarding of data to other foreign services are also assigned to the level of the director. Authorisation must be obtained from the Minister of Defence in cases of assistance,⁴⁶ the provision of unevaluated data, the performance of joint operations where powers are deployed that require the authorisation of the Minister and where issues of a politically sensitive nature are involved. For requests to foreign services that relate to the use of investigatory powers, authorisation must be requested at the level that would apply if the MIVD were to deploy those powers itself.⁴⁷

The policy framework indicates that this internal authorisation structure involves the minimum authorisation levels. The director of the MIVD can deviate from these authorisation levels in the weighting note, for each foreign service, by filing these at a higher level. Under the policy framework, this can be advisable, for example, when cooperation takes place with a foreign service that does not meet the criterion of respect for human rights.

Finally, the policy framework gives a **process description** for entering into a cooperative relationship and the adoption, in that context, of a weighting note and a cooperative agreement.⁴⁸ Should the need arise to cooperate with a foreign service with which no relationship has yet been built up, a **provisional weighting note** is drafted. The provisional weighting note must indicate to what extent the criteria for cooperation are met. Based on this provisional weighting note, the management of the MIVD decides whether cooperation can be further explored and under what conditions. The Secretary-General of Defence is informed of this. **The Minister of Defence is also informed** if the **cooperation involves a political risk**. Then a **final weighting note** is drafted and submitted to the management of the MIVD. Once the weighting note has been adopted, cooperation can be implemented and a cooperation agreement can be reached with the foreign service in question.

In her response to the review report, the Minister of Defence indicated that the policy of the MIVD, in advance of amendment of the ISS Act 2002, is being modified. With immediate effect, in order to enter into cooperation with a foreign service, ministerial authorisation will be explicitly prescribed by the policy. This also includes foreign services that do not meet the cooperation criteria. The policy also states that ministerial authorisation is needed for the provision of personal data to foreign services

⁴⁶ Assistance concerns the deployment of (investigatory) powers exclusively in the interests of the foreign service and at the latter's request (Article 59 (4) ISS Act 2002).

⁴⁷ If the MIVD requests a foreign service, for example, to install telephone tapping or to select satellite communication, authorisation must first be obtained from the Minister of Defence.

⁴⁸ Cooperative agreements comprise non-binding arrangements, which set forth which practical and substantive rules both parties plan to abide by in bilateral cooperation; see also CTIVD Review Report no. 22b on the cooperation by DISS with foreign intelligence and/or security services, *Parliamentary Documents II* 2014/15, 29 924, no. 128 (appendix), available at www.ctivd.nl, legal appendix, p. 11-12.

that do not meet the cooperation criteria and for the provision of personal data that is politically sensitive in nature.

Conclusions concerning the policy of the MIVD

In motion no. 89, the Dutch House of Representatives requested the government to pursue more detailed implementation of the cooperation criteria. It is up to the House of Representatives to assess whether the policy of the MIVD adequately does this. The CTIVD provides the following guidelines for this.

The CTIVD finds that the above **policy of the MIVD is in line with the present ruling as laid down in the current ISS Act 2002**. The ISS Act 2002 and the legislative history of this act require that the MIVD determine, based on the cooperation criteria, whether a foreign service qualifies for cooperation. The policy of the MIVD prescribes how the assessment must be made on the basis of the cooperation criteria. In addition, the MIVD uses an authorisation structure that is in line with or exceeds the requirements of the Act.

When the CTIVD incorporates into its assessment (1) its conclusions and recommendations from previous review reports, (2) the promises made by the Minister of the Interior and Kingdom Relations and the Minister of Defence to the Dutch House of Representatives in response to the recommendations of the CTIVD and in response to motion no. 89, (3) the cabinet's position as laid down in the draft bill for a new ISS Act and (4) case-law developments in the field of data protection, it reaches additional conclusions:

- One point of the MIVD's policy is **not entirely in line with the promises made by the Minister**. The policy states that, in a new cooperative relationship, the Minister is informed of the provisional weighting of the cooperation criteria if the intended cooperation involves a political risk. According to this policy, the final weighting note is not submitted to the Minister. The cabinet has indicated to the Dutch House of Representatives that the Minister **must give authorisation** and that this must take place **when entering into a cooperative relationship with a foreign service that does not meet all the criteria, according to the weighting note**.⁴⁹ The Minister of Defence indicated, in her response to the review report, that the policy is being modified with immediate effect and that, from now on, ministerial authorisation is required in order to enter into cooperation with a foreign service.
- The policy devotes limited attention to the exchange of **unevaluated data**, nor is the possibility of exchanging unevaluated data included in the template as a separate component. In line with review report no. 38 and the political debate on interception by the NSA and the role of the Netherlands in that activity, the CTIVD believes it is important for the MIVD, in anticipation of a possible change to the law, to adopt a policy in this area. The CTIVD discusses this subject extensively in its review report on the implementation of Dutch House of Representatives motion no. 96.⁵⁰
- The **level of data protection** given by the foreign service is incorrectly not cited as a criterion in the template for weighting notes. In connection with the exchange of personal data and of unevaluated data, it is important for this to be mapped out on the basis of the contents of the rules applicable to the service in question, as these are evident from domestic law or international commitments, and on the basis of practice that must ensure compliance with those rules. In that context, attention must be devoted to the **safeguards in the area of data processing**, such as the storage and destruction of data.

⁴⁹ *Parliamentary Documents II* 2013/14, 33 820, no. 4, p. 6; *Proceedings II* 2013/14, no. 73, item 8, p. 23.

⁵⁰ Review report no. 49, adopted on 4 May 2016, will be published simultaneously.

- The MIVD's policy does not deal specifically with cooperation with foreign services that do not meet the criteria for cooperation. In contrast to the AIVD's policy, the policy of the MIVD does not indicate what the consequences are for the permitted forms of cooperation if one or more criteria for cooperation are not met. In its internal policy, the MIVD does not impose any restrictions on cooperation with these foreign services. The policy framework indicates that the director of the MIVD can decide to transfer the required authorisation for various forms of cooperation to a higher level. The cases in which the authorisation level must be raised are not described nor are those in which certain forms of cooperation are excluded in principle. In her response to the drafted review report, the Minister of Defence has indicated that the policy states, with immediate effect, that ministerial authorisation is needed for the provision of personal data to foreign services that do not meet the cooperation criteria.

Application of the policy depends entirely on the adoption of **adequate weighting notes**. On the one hand, the weighting notes must provide sufficient information. They must cover the powers and (technical) possibilities of the foreign service and the level of data protection provided, and provide an insight into the degree to which the other criteria for cooperation are met. On the other hand, based on this information, a thorough assessment must be made of where potential risks can occur and what forms of cooperation are permitted in which cases and under which circumstances. How this has been implemented in practice is discussed in section 5.2.

5.2 MIVD weighting notes

The previous investigation by the CTIVD into cooperation between the MIVD and foreign intelligence and/or security services examined how and on what grounds decisions to enter into or to further develop a cooperative relationship are taken within the MIVD in practice. The CTIVD found at the time that the MIVD had not (yet) drawn up any notes in which an assessment is made, based on the cooperation criteria, as to whether the foreign service in question qualifies for cooperation.

The most important developments that have taken place in practice since the previous investigation by the CTIVD are discussed below.

Developments since report 22b (2013-2015)⁵¹

In the spring of 2014, **two weighting notes** were adopted by the MIVD. They were a **test** in order to review internally what information should be included in the weighting notes. After adopting these two weighting notes, no new weighting notes were submitted to the MIVD management for eighteen months. The MIVD explained that drawing up the weighting notes involved more work than was initially estimated and that limited capacity was therefore assigned to them. However, the joint template for weighting notes was coordinated with the AIVD.

The MIVD compiled a **questionnaire and distributed it to foreign services** with the aim of gaining a clearer picture of the tasks and powers of these services. The MIVD indicated that only a limited number of substantive responses has been received from foreign services. For this reason, the MIVD decided to investigate the tasks and powers of foreign services itself first and then to put a limited number of unanswered questions to the services in question.

⁵¹ Review Report 22b was published in August 2015. However, the investigation period covered up to the end of 2013. In this investigation, therefore, the CTIVD looked back to the end of 2013.

During this period, the MIVD also drew up a **cooperation recommendation** for three new cooperative relationships, which covers among other things the criteria for cooperation. The CTIVD did not substantively review these recommendations. In compliance with the policy of the MIVD, a weighting note must be drafted for these foreign services.

In the spring of 2015 a new **plan** was adopted. The plan involves forming a writing team that can draw up the weighting notes for strategic partner services within a timeframe of two weeks. Following internal coordination with the departments involved, the weighting notes can be submitted to the management of the MIVD. In this plan, the two previous weighting notes will be included and updated. The plan was executed in October 2015.

Distribution of tasks with AIVD

It was clear to the CTIVD from its investigation that the AIVD and MIVD have **not chosen to adopt each other's weighting notes and to agree mutually on a distribution of tasks**. Both services have indicated that they do not regard such a procedure as advisable. The AIVD and MIVD cooperate with foreign services in different ways and in different fields. The value that is attached to the cooperative relationship also differs. For these reasons, it is seen as important for each service to make its own assessment. Coordination does take place between the AIVD and MIVD with respect to the more factual information in the weighting notes. However, a distribution of tasks has been agreed with respect to some foreign services. This relates to foreign services with which cooperation takes place exclusively through the Joint Sigint and Cyber Unit (JSCU) and not through other departments within the AIVD and MIVD. The JSCU is a joint unit of the AIVD and MIVD that operates in the field of Sigint and Cyber.

The CTIVD established that the AIVD and MIVD **regularly consult one another** on cooperation with foreign services, including at the level of the heads of the Foreign Relations department (AIVD) and the External Relations bureau (MIVD). During these consultations, all kinds of practical and policy-related matters are coordinated. The AIVD and the MIVD have indicated that, in 2016, they will jointly evaluate the recently created weighting notes and the process underlying them.

Recently adopted weighting notes (2015-2016)

In November 2015, **four new weighting notes** were submitted to the management of the MIVD. An accompanying note indicated that these implement the recommendation of the CTIVD that the MIVD must fundamentally assess to what extent the stated cooperation criteria are met for each individual foreign service. In addition, the note indicated that, from a strategic relationship management perspective, it is important that the cooperation with partner services be established in writing and revised at set times. The weighting notes therefore have a two-fold aim and serve as accountability documents and as a steering tool. Furthermore, it notes that the authorisation levels cited in the weighting notes have been drafted subject to a change to the policy framework for international cooperation. When the policy framework was definitively adopted (in January 2016), the weighting notes were adjusted accordingly. They indicate, with respect to one of the four foreign services, that the service in question has a relatively high risk profile. A careful balance of the risks against the usefulness and the need for the cooperation is of additional importance.

In January 2016, the management of the MIVD adopted **three new weighting notes**. In February 2016, another **ten new weighting notes** were assessed and approved. During the investigation, the MIVD indicated that it expects to be able to create another twenty weighting notes in 2016.

Contents of weighting notes

The CTIVD finds that the seventeen recently adopted weighting notes generally give a **detailed description** of the state in question, the relevant foreign service, the cooperation that has taken place up to that time and the possibilities and limitations identified by the MIVD in the cooperation. Most of the cooperation criteria are implemented and discussed separately in the weighting notes. This leads to the assessment “satisfactory” or “unsatisfactory” assessment for each cooperation criterion. The MIVD has added two levels to the “unsatisfactory” assessment: moderate and poor. It is not clear to the CTIVD on what basis the distinction is made, whether this has had consequences for the ultimate conclusion and, if so, what those consequences are.

With regard to implementation of the cooperation criteria of respect for human rights and democratic anchorage, the CTIVD notes that the information in the weighting notes is comprehensive in most cases. The CTIVD does note, however, that some weighting notes **give a different implementation to the criteria of respect for human rights and democratic anchorage** and differ as to the content of these criteria. Fifteen of the seventeen weighting notes conclude that the foreign service meets the criteria for democratic anchorage and respect for human rights. In two of these fifteen cases, the text of the weighting note expresses doubt about whether the foreign service shows adequate respect for human rights, without justifying why the conclusion is nevertheless positive. However, the MIVD does state that this is an area of concern in the cooperative relationship. Two of the seventeen cases conclude that the foreign service does not adequately meet the two criteria.

Sixteen of the seventeen weighting notes do **not discuss how the legal powers and (technical) possibilities are assigned within the foreign service**. One of these sixteen cases mentions that the foreign service is not permitted to intercept communications of a domestic transmitter and receiver. In some cases, reference is made to the fact that the foreign service has executive powers. Most cases do include the domestic legal rules that apply to the relevant service, although no further details are given about the content of the rules. Equally, no explanation is given concerning the extent of the efforts made by the MIVD to identify the legal powers and (technical) possibilities of the foreign services. The sole case in which the legal powers and (technical) possibilities are identified concerns a foreign service with which the JSCU⁵² cooperates. The CTIVD notes that its recommendation that the services must find out more about the legal powers and (technical) possibilities of foreign services so that justified assessments can be made⁵³, relates to foreign services with which close cooperative relationships exist. However, the Minister of the Interior and Kingdom Relations and the Minister of Defence did indicate generally to the Dutch House of Representatives, during the debate of 9 April 2014, that from now on attention will be devoted in the weighting notes to the way in which the powers and procedures are assigned within the foreign service and how that relates to its own authorisation framework.⁵⁴

The **professionalism and reliability** of the foreign services in question are only discussed in detail in the event of any doubts or areas of concern. This is the case in three of the seventeen weighting notes. In most weighting notes, this cooperation criterion is discussed briefly. In three cases, the assessment is confined to the fact that the foreign service is referred to as professional by (some) teams or departments of the MIVD and that there are no indications to the contrary. The CTIVD is of the opinion that the MIVD **can and must implement this criterion more extensively and in a more well-founded way** by specifically indicating on what basis the MIVD regards the relevant foreign services as professional and reliable.

⁵² Joint Sigint Cyber Unit, joint unit of the AIVD and the MIVD that operates in the areas of Sigint and Cyber.

⁵³ CTIVD Review Report no. 38 on the processing of telecommunications data by GISS and DISS, *Parliamentary Documents II* 2013/14, 29 924, no. 105 (appendix), available at www.ctivd.nl, section 5.1.

⁵⁴ *Proceedings II* 2013/14, no. 73, item 8, p. 23 and 45.

The MIVD has also discussed **other cooperation criteria** separately and transparently in the weighting notes. These criteria, which are cited in the legislative history, are advisability of cooperation in the context of international commitments, the enhancement of the performance of tasks of the MIVD and reciprocity (*quid pro quo*). Sixteen of the seventeen weighting notes conclude, based on the information, that the foreign services in question meet these criteria. In one case, reciprocity in the cooperative relationship is not given sufficient attention.

The **level of data protection** by the foreign service is not included in any of the seventeen weighting notes, nor is it made clear to what extent the MIVD has made efforts to cover this topic.

Based on the extent to which the cooperation criteria are met, an assessment is made regarding **which forms of cooperation are permitted: protocol-based, analytical or operational cooperation**.⁵⁵ The weighting notes also indicate **which authorisation structure applies**, in other words at which level authorisation must be obtained. The permitted forms of cooperation are mentioned in the weighting notes but are not further detailed. In that context, the possibility of providing personal data or of providing unevaluated data is also **not** further substantiated. The CTIVD is of the opinion that the MIVD must indicate, in the weighting notes, what risks can be associated with the cooperation. For instance, the MIVD must include whether and under what circumstances the provision of unevaluated and personal data to the relevant foreign service and the use of similar received data are permitted. This can differ per task area. There may also be risks that only manifest themselves with regard to certain fields of investigation.⁵⁶

The CTIVD finds that the weighting notes indicate that **all forms of cooperation are permitted** for fifteen of the seventeen foreign services. The authorisation level for the various activities that can be carried out within the cooperation is not raised. The CTIVD establishes that the criterion of reliability and professionalism of the relevant foreign service is assessed as inadequate in one of these fifteen cases. In the weighting note, the MIVD indicates that it will take mitigating measures.

The CTIVD finds that the MIVD has limited the permitted forms of cooperation in one of the seventeen cases. The foreign service does not meet the criteria of democratic anchorage, respect for human rights and professionalism and reliability. In the weighting note, the possibilities for cooperation are **limited to the analytical level and the authorisation level is raised**. In all cases, the authorisation of the director of the MIVD must be obtained for the sharing of data. The weighting note further indicates that the MIVD intends to develop a limited form of operational cooperation with this foreign service in the long term, which deviates from the limitation to the analytical level of cooperation. No reasons are given for this step outside the boundaries of the weighting note.

In the latter case, the foreign service does not meet the criteria of democratic anchorage, professionalism and reliability and reciprocity. The CTIVD notes that the MIVD nonetheless regards all forms of cooperation – protocol-based, analytical and operational – as permissible. Operational cooperation is subject to the limitation that it is permitted provided the director of the MIVD gives consent thereto. The authorisation structure for cooperation with this foreign service is not further raised. The MIVD does not, in this case, substantiate the compelling grounds on which these choices were made, despite the fact that certain cooperation criteria are not met. The CTIVD notes that the above corresponds to its observation in section 5.1, that the policy of the MIVD does not deal specifically with cooperation with foreign services that do not meet the criteria for cooperation. In contrast to the AIVD's policy, the policy of the MIVD does not indicate what the consequences are for the permitted forms of cooperation if one or more cooperation criteria is/are not met.

⁵⁵ This means, respectively, maintaining contacts (protocol-based), the exchange of data where an insight is gained into the current level of knowledge of the service (analytical) and forms of cooperation that provide an insight into the procedure or sources of the service or where the provision of personal data is involved (operational).

⁵⁶ In this context, see the review report on contributions of the MIVD to targeting, to be published.

Conclusions on the MIVD weighting notes

The CTIVD finds that, until mid-2015, the MIVD gave **limited priority** to creating weighting notes. Since the beginning of 2014, the MIVD has planned to draft weighting notes regarding its strategic partner services. In mid-2015, the MIVD created a new policy and gave increased priority to the creation of weighting notes. This has resulted in **seventeen weighting notes** being adopted by the management of the MIVD in late 2015 and early 2016. The MIVD has indicated that in 2016 it expects to be able to draft around twenty weighting notes.

The CTIVD finds that coordination takes place with the AIVD.

With regard to the contents of the weighting notes, the CTIVD reaches the following conclusions:

- In general, the weighting notes give a **comprehensive explanation of certain cooperation criteria and a clear picture of the cooperative relationship** that the MIVD has built up with the foreign service. The information in the seventeen weighting notes is extensive in most cases. On each occasion, the MIVD individually and clearly describes the extent to which each of the stated cooperation criteria is met.
- Fourteen weighting notes briefly discuss the professionalism and reliability of the foreign service. The CTIVD is of the opinion that the MIVD **can and must more broadly implement this criterion** by specifically indicating the basis for classifying the foreign service as professional and reliable.
- With regard to sixteen of the seventeen foreign services, the way in which **legal powers and (technical) possibilities are assigned within the foreign service is not detailed**. In some cases it is established that the foreign service has executive powers. Most cases do include the domestic legal rules that apply to the relevant service. The CTIVD is of the opinion that, in all cases, attention must be devoted to the legal powers and (technical) possibilities of the foreign services in question, or that it must be made clear to what extent the MIVD has made efforts to identify this aspect.
- The **level of data protection** by the foreign service is not included in any of the seventeen weighting notes. In section 5.1, the CTIVD noted that this topic is not included in the template for weighting notes. The CTIVD is of the opinion that, with respect to the exchange of personal data and of unevaluated data, it is necessary to detail what are the implications of the level of data protection provided, on the basis of the content of the rules applicable to the service in question, as these are evident from domestic law or international commitments, and on the basis of the practice that must ensure compliance with those rules. In that context, attention must be devoted to safeguards in the field of data processing, such as the storage and destruction of data. If the MIVD is lacking information, it must be made clear to what extent the service has made efforts to identify this aspect.
- Based on the information in the weighting notes, the MIVD has assessed whether the criteria for cooperation are met. According to the weighting notes, fourteen of the seventeen foreign services meet the cooperation criteria. One of the seventeen foreign services is regarded by the MIVD as inadequately professional and reliable. Two foreign services do not meet several cooperation criteria, according to the weighting notes. The CTIVD is of the opinion that **the information in the weighting notes can in principle support the assessment of whether the cooperation criteria are met**. In two cases, reasons must be given for regarding the respect for human rights by the foreign service as adequate, despite the doubt raised in this respect in the text of the weighting note.

- Based on the weighting of the cooperation criteria, the weighting notes indicate which forms of cooperation are permitted: protocol-based, analytical and/or operational cooperation. The weighting notes also indicate which authorisation structure subsequently applies, in other words at what level authorisation must be obtained for the various activities that can be carried out as part of the cooperation. The permitted forms of cooperation are mentioned in the weighting notes but are not further developed. In that context, the possibility of providing personal data or of providing unevaluated data is also not further substantiated. The CTIVD is of the opinion that the MIVD must indicate, in the weighting notes, what risks can be associated with the cooperation.
- The CTIVD notes that the MIVD has indicated, in the weighting notes for fifteen of the seventeen foreign services, that all forms of cooperation are permitted and the standard authorisation structure applies. The CTIVD is of the opinion that each of these fifteen weighting notes can **in principle support this conclusion**. It notes, in this respect, that in cases where it is of the opinion that the weighting notes must be supplemented, such supplements could influence the final assessment.
- In one case, the MIVD limited the permitted forms of cooperation to the analytical level and, in all cases, placed the authorisation level for sharing information at the level of the director of the MIVD. The CTIVD is of the opinion that **this conclusion is supported by the contents of the weighting note**. The weighting note also indicates that the MIVD intends to develop a limited form of operational cooperation with this foreign service in the long term, which deviates from the limitation to the analytical level of cooperation. The CTIVD believes it is important that, if a foreign service does not meet one or more cooperation criteria, the weighting note should indicate what risks are present as a result and what consequences this has for the forms of cooperation that are permitted in principle. When the MIVD, in an individual case or for the purpose of a particular investigation, wants to step **outside the established boundaries**, then this must be explained by the MIVD. This must involve indicating to what extent it is seen as likely that the risks identified will actually manifest themselves and whether the compelling (operational) interests of the MIVD take precedence. The CTIVD notes that this **explanation is missing**.
- In one case, the foreign service does not meet the criteria of democratic anchorage, professionalism and reliability and reciprocity. Nevertheless, the MIVD determined that all forms of cooperation are permitted. Operational cooperation with this foreign service is subject to the limitation that this is permitted provided the director of the MIVD gives consent thereto. In addition, the authorisation structure for the cooperation is not raised. The CTIVD is of the opinion that **the contents of the weighting note cannot support this conclusion**. The MIVD does not indicate which compelling reasons are regarded by the service as a basis for being able to go so far in the cooperation, despite the failure to meet certain cooperation criteria.

6 Conclusions

Assessment framework

Motion no. 89

In motion no. 89 by members Schouw (D66) and Segers (CU), the Dutch House of Representatives requests the government to pursue more detailed implementation of the criteria for cooperation and the CTIVD to review its execution. In response to the motion, the Minister of the Interior and Kingdom Relations and the Minister of Defence promised to include the criteria for cooperation in the modified ISS Act 2002. During the debate on interception by the NSA and the role of the Netherlands (9 April 2014), both Ministers indicated that weighting notes relating to the criteria for cooperation are being drawn up for foreign intelligence and/or security services with which cooperation takes place. They promised that, from now on, attention would also be devoted to the ways in which the powers and procedures are assigned within the foreign services. (Chapter 1)

ISS Act 2002

The ISS Act 2002 requires that the AIVD and MIVD assess whether a foreign intelligence and/or security service qualifies for cooperation. The cooperation criteria that must be involved in this assessment are derived from the legislative history of the ISS Act 2002. They are democratic anchorage and the respect for human rights by the foreign service, the professionalism and reliability of the foreign service, the advisability of cooperation in the context of international commitments, the enhancement of the performance of the tasks of the AIVD or MIVD and reciprocity (*quid pro quo*). (section 3.1)

CTIVD oversight

In previous review reports, the CTIVD described how the AIVD (report 22a, 2009) and the MIVD (report 22b, 2015) assess whether foreign intelligence and/or security services qualify for cooperation. It has included its conclusions and recommendations at the time and the promises made by both Ministers in this report.

In review report no. 38 on the processing of telecommunications data by the AIVD and the MIVD, the CTIVD took the position that, in the light of the revelations about the NSA, among other things, it was advisable to examine whether the trust placed in foreign services by the AIVD and the MIVD is still justified. Specifically, this meant that the heads of the AIVD and the MIVD, under the political responsibility of the Ministers in question, had to find out more about the legal powers and (technical) possibilities of foreign services so that they could make justified assessments. In this context, the CTIVD recommended that the Minister of the Interior and Kingdom Relations and the Minister of Defence assess the cooperative relationships (including at international level) for transparency and further define the assessments underlying the cooperation. The Ministers adopted the recommendation of the CTIVD. (section 3.2)

ISS 20XX Act Draft Bill

The draft bill states that an assessment must be made regarding whether a cooperative relationship with a foreign intelligence and/or security service can be entered into and what the nature and intensity of the cooperation can be. Three criteria are mentioned in the proposed legislative text that must, in all cases, be involved in this assessment: democratic anchorage, respect for human rights and professionalism and reliability. The explanatory memorandum of the draft bill makes it clear that the risks associated with any cooperation must be identified. The result of the weighting must provide an answer to the question whether a cooperative relationship can be entered into and, if so, how this cooperation is implemented. (section 3.3)

Case-law developments

In an important judgement of 6 October 2015 (Schrems), the Court of Justice of the European Union outlines a general framework for data protection that serves as a safeguard for the protection of privacy. Although this judgement does not discuss the provision of personal data in the context of national security, the CTIVD nonetheless believes it is important to draw attention to this judgement. It makes it clear that countries where the powers of government institutions exceed what is necessary in a democracy are not regarded as “safe harbours” for personal data. The CTIVD believes it is important for the AIVD and the MIVD to take this into account in their own assessment based on the cooperation criteria as to whether personal data can (automatically) be provided to a foreign service. The system of data protection with respect to the service in question must be taken into consideration in the context of the weighting notes. (section 3.4)

Weighting note as a safeguard

Based on the assessment of the cooperation criteria, the weighting note must provide an insight into the boundaries of the trust that can be placed in the foreign service and what the nature and intensity of the cooperation can be. Any risks that may be associated with the cooperation must be identified. The general assessment in the weighting note must be taken into account in the assessments that must be made in every individual case of data exchange, joint operation or assistance. Therefore, a two-fold assessment must take place in every individual case of cooperation: does it fit within the limits of the cooperative relationship as defined in the weighting note and, in that context, does it meet the requirements of necessity, proportionality and subsidiarity? The weighting note thus forms an important safeguard for the protection of privacy.

Where risks arise in individual cases of data exchange, joint operation or assistance, the general assessment based on the cooperation criteria is the most relevant. The weighting notes indicate, in a balanced and well-reasoned manner, in which areas of cooperation potential risks can occur and under what circumstances cooperation is permitted. Each individual case is assessed to determine whether the risks mentioned in the weighting note are present and, if that is the case, what compelling (operational) reasons exist for still proceeding with the data exchange, joint operation or assistance for the foreign service.

The weighting note must serve as a framework for cooperation with the foreign service. It thus provides an important safeguard for the protection of privacy. (section 3.5)

Policy and practice

AIVD and MIVD policy

In motion no. 89, the Dutch House of Representatives requested the government to pursue more detailed implementation of the cooperation criteria. It is up to the Dutch House of Representatives to assess whether the policy of the AIVD adequately does this. The CTIVD provides the following guidelines for this.

The policies of the AIVD and MIVD are in line with the present ruling as laid down in the current ISS Act 2002. The policies of both services prescribe how and based on which considerations the assessment on the basis of the cooperation criteria must be made. However, the ISS Act 2002 forms only part of the assessment framework. When the CTIVD takes the entire assessment framework into consideration, it reaches the following conclusions:

- The policies of both services are not in line with the promises made by the Minister of the Interior and Kingdom Relations and the Minister of Defence that they must give authorisation for cooperation with foreign services that do not meet all the cooperation criteria. The policy of the AIVD prescribes that authorisation must be requested from the Minister only when certain cooperation criteria are not met. In other cases, the policy gives the director-general of the AIVD the flexibility to decide to request authorisation from the Minister. The policy of the MIVD is based on informing the Minister of a provisional weighting of the cooperation criteria. According to this policy, the final weighting note is not submitted to the Minister. The Minister of Defence indicated, in her response to the drafted review report, that the policy is being modified with immediate effect and that, from now on, ministerial authorisation is required in order to enter into cooperation with a foreign service.
- The policies of both services, including the template for weighting notes, do not cover assessment of the system of data protection by the foreign services and cover the possibility of exchanging unevaluated data only to a limited extent. The CTIVD believes it is important for this to be detailed on the basis of the rules applicable to the service in question, as these are evident from domestic law or international commitments, and on the basis of the practice that must ensure compliance with those rules. In that context, attention must also be devoted to the safeguards in the field of data processing, such as the storage and destruction of data.
- The AIVD's policy for the provision of personal data creates confusion in terms of the level of authorisation. In his response to the drafted review report, the Minister of the Interior and Kingdom Relations indicated that the policy for the provision of personal data to foreign services that do not meet the cooperation criteria will be clarified. The required authorisation is being assigned to the director-general of the AIVD. In this context, a difference exists with the MIVD. The Minister of Defence has indicated that the MIVD's policy states that ministerial authorisation is needed in this case.
- The MIVD's policy does not deal specifically with cooperation with foreign services that do not meet the criteria for cooperation. In contrast to the AIVD's policy, the policy of the MIVD does not indicate what the consequences are for the permitted forms of cooperation if one or more criteria for cooperation is/are not met. In her response to the drafted review report, the Minister of Defence has indicated that the policy states, with immediate effect, that ministerial authorisation is needed for the provision of personal data to foreign services that do not meet the cooperation criteria. (sections 4.1 and 5.1)

Drawing up weighting notes

The CTIVD notes that drawing up weighting notes is a comprehensive and labour-intensive process. It involves living documents that require a great deal of effort and regular adjustment. The AIVD and MIVD must re-assess regularly (at least every two years) whether the relevant foreign service still meets the cooperation criteria to the same extent. The services must also continually keep an eye on whether incidents occur or whether the circumstances of the cooperation change to such an extent that interim adjustment of the cooperation is required.

AIVD weighting notes

The CTIVD notes that, until early 2015, the AIVD gave little priority to the creation of weighting notes. Within the AIVD, various developments have taken place since the previous CTIVD investigation into cooperation with foreign services (2009). The result of these developments is that weighting notes have been prepared that relate to ten foreign services. The weighting notes were written within the AIVD during the period before Dutch House of Representatives motion no. 89 was adopted in April 2014. Some of them are currently being updated. For this reason, the CTIVD has not substantively reviewed the weighting notes.

At the beginning of 2015 the AIVD launched the weighting notes project. The project aims, on the one hand, to embed the creation and use of weighting notes into the working processes of the AIVD. On the other hand, the project focuses on the actual delivery of new or updated weighting notes. As of the conclusion of the investigation by the CTIVD, the project has not yet been completed. The AIVD has indicated that a proposal will be made to the management in the first half of 2016 for an internal working process for the purpose of drawing up weighting notes and keeping them up to date.

In the context of the project, seventeen draft weighting notes have now been drawn up. The CTIVD has chosen to communicate its findings concerning the draft weighting notes in a letter to the Minister of the Interior and Kingdom Relations. It makes some comments about the quantity and depth of the information included in the draft weighting notes and about the assessment based on them regarding whether the cooperation criteria are met. It also notes that some basic information is missing. Furthermore, the CTIVD has questions about the way in which the policy framework of international cooperation of the AIVD is applied in assessing which forms of cooperation are permitted based on weighting of the cooperation criteria.

The CTIVD notes that coordination takes place with the MIVD. (section 4.2)

MIVD weighting notes

The CTIVD finds that, until mid-2015, the MIVD gave limited priority to creating weighting notes. Since the beginning of 2014, the MIVD has been planning to draft weighting notes regarding its strategic partner services. In mid-2015, the MIVD created a new policy and gave increased priority to the creation of weighting notes. This resulted in the drawing up of seventeen weighting notes by the management of the MIVD in late 2015 and early 2016. The MIVD has indicated that in 2016 it expects to be able to draft around twenty weighting notes.

The CTIVD finds that coordination takes place with the AIVD.

With regard to the contents of the weighting notes, the CTIVD reaches the following conclusions:

- In general, the weighting notes give a comprehensive explanation of certain cooperation criteria and a clear picture of the cooperative relationship that the MIVD has built up with the foreign service.
- Fourteen of the seventeen weighting notes briefly discuss the professionalism and reliability of the foreign service. The CTIVD is of the opinion that the MIVD can and must more broadly implement this criterion by specifically indicating the basis for the classification of the foreign service as professional and reliable.
- With regard to sixteen of the seventeen foreign services, the way in which legal powers and (technical) possibilities are assigned within the foreign service is not detailed. The CTIVD is of the opinion that, in all cases, attention must be devoted to this or that it must be made clear to what extent the MIVD has made efforts to cover this topic.
- The level of data protection by the foreign service is not included in any of the seventeen weighting notes. The CTIVD is of the opinion that each of the weighting notes must detail what the implications are of the level of data protection provided. If the MIVD is lacking information, it must be made clear to what extent the service has made efforts to identify this aspect.

- Based on the information in the weighting notes, the MIVD has assessed whether the criteria for cooperation are met. The CTIVD is of the opinion that the information in the weighting notes can in principle support this assessment. In two cases, reasons must be given for regarding the respect for human rights by the foreign service as adequate, despite the doubt raised in this respect in the text of the weighting note.
- Based on the weighting of the cooperation criteria, the weighting notes indicate which forms of cooperation are permitted and which authorisation structure subsequently applies within the MIVD. The CTIVD is of the opinion that the MIVD must develop this further and must indicate, in the weighting notes, the risks that can be associated with the cooperation. For instance, the weighting note must include whether and under what circumstances the exchange of personal data or of unevaluated data is permitted.
- The CTIVD is of the opinion that sixteen of the seventeen weighting notes can in principle support the conclusion concerning which forms of cooperation are permitted.
- In one case, the MIVD indicates in the weighting note that it intends to develop a limited form of operational cooperation with the foreign service in the long term, which steps outside the stated boundaries (the analytical level). When the MIVD, in an individual case or for the purpose of a particular investigation, wants to step outside the established boundaries, then this must be explained by the MIVD. This involves indicating to what extent it is seen as likely that the risks identified will actually manifest themselves and whether the compelling (operational) interests of the MIVD take precedence. The CTIVD notes that this explanation is missing.
- In one case, the CTIVD is of the opinion that the conclusion of the weighting note is not supported by the content. The MIVD does not indicate which compelling reasons are regarded by the service as a basis for being able to go so far in the cooperation, despite the failure to meet certain cooperation criteria. (section 5.2)

Thus adopted at the meeting of the Committee held on 4 May 2016.

CTIVD no. 48

DEFINITIONS

for the review report on the implementation of cooperation criteria
by the AIVD and the MIVD

investigation into the execution of Dutch House of Representatives motion no. 89
(by members Schouw and Segers)

This list explains a number of terms used in the review report. In the descriptions provided, the CTIVD's aim was not completeness, but to try to give the reader as clear a picture as possible of the terms in question.

Analytical cooperation

The exchange of data (that is not personal data) that provides an insight into the current level of knowledge of the service.

Assistance

The deployment of powers for a foreign service and at the latter's request. Such deployment does not take place in the context of the AIVD or MIVD's task execution, but in the interest of the foreign service (Article 59 (4) ISS Act 2002).

Authorisation framework (MIVD)

Framework in the MIVD weighting notes that includes which officer must give authorisation for which activity.

Cooperation criteria

The criteria the service must use in order to assess whether a foreign service qualifies for cooperation. These criteria include respect for human rights and the democratic anchorage of the foreign service; the tasks, professionalism and reliability of the foreign service; the advisability of cooperation in the context of international commitments; enhancement of the performance of tasks; the degree of reciprocity; the legal powers and (technical) possibilities of the foreign service and the degree of data protection by the foreign service.

Data processing

Collecting, recording, arranging, storing, updating, altering, demanding access to, consulting or using data, providing data by forwarding, dissemination or any other means of making data available, assembling or combining data, and protecting, deleting or destroying data (Article 1(f) ISS Act 2002). The mere act of gathering data is also referred to as data acquisition.

Data protection

Safeguards for the protection of data as evident from legal rules and practice, for instance concerning data processing, such as the storage and destruction of data.

Director (AIVD)

Officer at the AIVD positioned in the organisation's hierarchy as follows: director-general, *director*, head of unit, head of team.

Director-general (AIVD)	Officer in charge of the AIVD. The position in the organisation's hierarchy is as follows: <i>director-general</i> , director, head of unit, head of team.
Director (MIVD)	Officer in charge of the MIVD. At the MIVD, the director is positioned in the organisation's hierarchy as follows: <i>director</i> , head of department, head of bureau, head of section.
Evaluated data	Data which has been assessed for relevance.
Foreign service	An intelligence and/or security service of another country.
Head of bureau (MIVD)	Officer at the MIVD positioned in the organisation's hierarchy as follows: director, head of department, <i>head of bureau</i> , head of section.
Head of department (MIVD)	Officer at the MIVD positioned in the organisation's hierarchy as follows: director, <i>head of department</i> , head of bureau, head of section.
Head of section (MIVD)	Officer at the MIVD positioned in the organisation's hierarchy as follows: director, head of department, head of bureau, <i>head of section</i> .
Head of team (AIVD)	Officer at the AIVD positioned in the organisation's hierarchy as follows: director-general, director, head of unit, <i>head of team</i> .
Head of unit (AIVD)	Officer at the AIVD positioned in the organisation's hierarchy as follows: director-general, director, <i>head of unit</i> , head of team.
High-risk service (AIVD)	A foreign service which, according to the AIVD, does not meet the criteria of respect for human rights and democratic anchorage. The MIVD does not use this term.
Intelligence service	A service that conducts investigations regarding other countries for the purpose of identifying (potential) threats to the service's own national security.
Investigatory power	A power conferred on a service by law to use a specific method that infringes privacy, which provision of law also lays down the circumstances and conditions under which the power may be exercised. Investigatory powers are usually exercised in secret. The investigatory powers are set out in Articles 20 - 30 ISS Act 2002 (e.g. interception and surveillance).
ISS Act 2002	Intelligence and Security Services Act 2002. This law is in force at the time of the investigation by the CTIVD.
ISS Act 20XX	Modification of the Intelligence and Security Services Act 2002. In July 2015, the ISS 20XX Act Draft Bill was published for Internet consultation. On 15 April 2016, the cabinet approved the bill. At the time of preparation of this report, the bill is awaiting the recommendation of the Council of State.
JSCU	Joint Sigint Cyber Unit, joint unit of the AIVD and the MIVD that processes data in the areas of Sigint and Cyber.

Operational cooperation	Forms of cooperation that provide insight into the procedure or sources of the service or involving the provision of personal data.
Partner service	A foreign service with which the AIVD or the MIVD has a cooperative relationship.
Personal data	Data relating to an identifiable or identified individual natural person (e.g. a name or a photograph).
Protocol-based cooperation	Maintaining contacts with a foreign service.
Quid pro quo	Reciprocity: literally “One good turn deserves another”. Principle in cooperation between intelligence and security services.
Security service	A service that conducts investigations into persons and organisations that potentially represent a threat to the continued existence of the democratic rule of law, or to security or other vital interests of the State, or to the security and readiness of the armed forces.
Task performance	The performance of the tasks as described in Article 6 (2) ISS Act 2002 (AIVD) and Article 7 (2) ISS Act 2002 (MIVD).
Template for weighting notes	Example that must be followed for implementing a weighting note.
Unevaluated data	Data which has not yet been assessed for relevance.
Untargeted acquisition	Acquisition where the person, organisation or technical characteristic at whom/which the data acquisition is targeted cannot be specified in advance.
Weighting note	A document specifying the assessment of the extent to which a foreign service meets the cooperation criteria and which forms of cooperation are authorised.



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