



# Appendix I

to the review report on the AIVD and MIVD  
weighting notes for the international  
cooperation with the Counter Terrorism  
Group and sigint partners

**CTIVD no 60**

(adopted on 21 December 2018)



Review Committee  
on the Intelligence and  
Security Services



## Assessment Framework

### 1. The obligation to draw up weighting notes

Before the AIVD and the MIVD can enter into a cooperative relationship with a foreign service, they must first, based on a number of criteria, consider if this is permissible and if so what the nature and intensity of the proposed cooperation could be (Section 88(2) of the ISS Act 2017). The outcome of that weighting and the decision to subsequently enter into the cooperation is laid down in a weighting note. Under the ISS Act 2002, this weighting was an obligation that could be derived from the legislative history and the duty of care of the heads of service to enter into and maintain contacts with foreign services. In its review report no. 22A (2009) the CTIVD already recommended that the AIVD make a fundamental assessment for each foreign service of the degree to which the cooperation criteria are met. This recommendation was adopted by the Minister of the Interior and Kingdom Relations. The Minister of Defence also adopted a similar recommendation for the MIVD in July 2015 in response to the review report 22B (2015).

The obligation stipulated in the ISS Act 2017 that an assessment should be made when entering into cooperative relationships (i.e. new cooperative relationships) also means that the same assessment must be made for existing cooperative relationships of the AIVD and the MIVD if these are continued under the ISS Act 2017. To prevent these cooperative relationships from having to be temporarily suspended or terminated pending the assessment, the Act provides for a transition period of two years (Section 166 of the ISS Act 2017). This period was significantly reduced following the political and public debate in the context of the coalition agreement and referendum on the ISS Act 2017. The ministers pledged that the weighting notes for the lead group of trusted partners with which close cooperative relationships are maintained would be ready when the ISS Act 2017 came into effect, therefore on 1 May 2018.<sup>1</sup> This concerns the partners in the context of CTG and the partners in the area of sigint. The other weighting notes for existing cooperative relationships had to be adopted before 1 January 2019.<sup>2</sup>

<sup>1</sup> Letter from the Minister of the Interior and Kingdom Relations and the Minister of Defence to the House of Representatives, dated 15 December 2017, *Parliamentary documents II 2017/18*, 34 588 no. 69.

<sup>2</sup> Letter from the Minister of the Interior and Kingdom Relations and the Minister of Defence to the House of Representatives, dated 6 April 2018, *Parliamentary documents II 2017/18*, 34 588 no. 70.

## 2. The role of the weighting notes in the cooperation with foreign services

The weighting notes form part of the framework for cooperation with foreign services by the AIVD and the MIVD. Within that framework, they form the legal foundation; the basis on which all considerations in the cooperative relationship rest.

That means that the weighting notes must contain the information relevant to the decision about future cooperative activities with the relevant foreign service. That is one of the roles of the weighting notes: providing the required information about a cooperative partner. Another role is that of a written substantiation: the weighting note provides a justification for the decision whether or not to cooperate with a particular foreign service and for the permissible scope (content, intensity) of that cooperation. Also considered and included in the assessment are the risks associated with the cooperation and the available options to mitigate those risks. The final role of the weighting note is that of delineating the cooperation: the weighting note is a practical guideline for AIVD and MIVD staff involved in the practice of international cooperation which shows them which cooperative activities are authorized for which topics within the cooperation. The Act uses the system of a two-fold assessment that applies to cooperative activities in specific cases, such as providing personal data to a foreign service. The two-fold assessment consists firstly of the consideration: (1) Does the activity (provision of data) fit within the limits of cooperation, as defined in the weighting note? And subsequently (2): In that context, does the specific cooperative activity meet the requirements of necessity, proportionality and subsidiarity?<sup>3</sup> This second weighting is used to see to what extent the risks of the specific cooperative activity outweigh the importance of the cooperation. The risks identified in the weighting note must be applied to that specific case and there may be further risks. The Act provides for a number of categories of cooperative activities: providing evaluated or unevaluated data, granting technical or other forms of support (for example the use of an investigatory power) or requesting technical or other forms of support from a foreign service.

The Act allows in exceptional cases for the provision of data by the AIVD and the MIVD to foreign services with which they have no cooperative relationship (Section 64 of the ISS Act 2017). Such exceptions may only be made if there is an urgent or compelling reason, such as indications of a terrorist attack in the country concerned.<sup>4</sup> That means that in those exceptional cases data may be exchanged without an underlying weighting note. However, this was ruled out for unevaluated data obtained from investigation-related interception on the cable in the policy rules adopted by the Minister of the Interior and Kingdom Relations and the Minister of Defence at the end of April 2018. Therefore this is not permitted without a weighting note.

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<sup>3</sup> For data exchange the assessment concerns the requirements of necessity and propriety (Section 18 of the ISS Act 2017). Propriety includes proportionality and subsidiarity. For operational cooperation where investigatory powers are used, the assessment concerns necessity, proportionality and subsidiarity (Sections 26, 28 and 90(3) of the ISS Act 2017).

<sup>4</sup> Explanatory memorandum to the Intelligence and Security Services Act 2017, *Parliamentary Documents II* 2016/17, 34 588, no. 3, p. 138. This type of situation requires authorization from the minister (Section 64(2) of the ISS Act 2017).

### 3. The content of the weighting notes

The weighting note must provide an answer to the question whether a cooperative relationship can be entered into and, if so, what the nature and intensity of the proposed cooperation may be. The explanatory memorandum shows that the decision to cooperate must also be substantiated: Why is it necessary, even if not all criteria have been met? In addition, the memorandum states that the details of the cooperation and the applicable preconditions must be expounded. That involves first identifying the risks connected with the cooperation, based on the cooperation criteria. Those risks and any existing options to mitigate them are subsequently a determining factor for the scope of the cooperation. According to the explanatory memorandum, that scope can involve matters such as the topics on which and the circumstances under which the data can be exchanged and what other conditions must be fulfilled.

In its review report no. 48, the CTIVD stressed the importance of detailing the risks in the weighting note.<sup>5</sup> The risks detailed in the weighting note should be addressed separately in the substantiation of specific cooperative activities, such as providing personal data. At that time an assessment is made whether or not the possible risks could manifest in the case in question and, if so, what compelling reasons exist to provide the data anyway.

In all cases, the following criteria must be included in the weighting under the ISS Act 2017:

- a) Democratic anchorage of the service in the country in question;
- b) Respect for human rights by the country in question;
- c) Professionalism and reliability of the service in question;
- d) Legal powers and possibilities of the service in the country in question;
- e) The level of data protection offered by the service in question.

The first three criteria (democratic anchorage, human rights, professionalism and reliability) have already been part of the assessment framework for some time under the ISS Act 2002. The legal powers and possibilities criterion was added in 2014 following a recommendation from the CTIVD (see the discussion of that cooperation criterion below).<sup>6</sup>

In practice, the AIVD and the MIVD also use other cooperation criteria than the legal ones referred to above. These include the reciprocity of the cooperation or the extent to which the cooperation improves the service's performance of tasks. Those criteria relate to the question if the cooperation is opportune. In this investigation, the CTIVD only conducted its review against the five legal criteria.

#### Democratic anchorage

Whether a service has adequate democratic anchorage depends on a number of factors, according to the explanatory memorandum. Some factors to consider, for example, 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.<sup>7</sup>

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<sup>5</sup> CTIVD review report no. 48 on the implementation of the 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), *Parliamentary Documents II 2015/16*, 29 924, no. 142 (appendix), accessible on [www.ctivd.nl](http://www.ctivd.nl).

<sup>6</sup> See the recommendation on p. 41 of the CTIVD review report no. 38 on the processing of telecommunications data by the AIVD and the MIVD, *Parliamentary Documents II 2013/14*, 29 924, no. 105 (appendix), available at [www.ctivd.nl](http://www.ctivd.nl)

<sup>7</sup> Explanatory memorandum to the Intelligence and Security Services Act 2017, *Parliamentary Documents II 2016/17*, 34 588, no. 3, p. 160.

## Human rights

This criterion looks at whether the country in question has ratified human rights' treaties and whether these treaties are in fact observed. Another factor is whether the foreign service itself can be linked to the violation of human rights. This may appear from human rights violations reported by national and international human rights organizations.<sup>8</sup>

A specific component of the human rights criterion is the risk that the cooperation will contribute, directly or indirectly, to unlawful use of force in the form of illegal targeting. The review report no. 50<sup>9</sup> shows that the services must assess whether or not the state of the foreign service in question is involved in the use of force in the context of armed conflicts or a similar use of force. If that is the case, consideration should be given to whether the provision of information carries the risk of culpable contribution to an unlawful use of force.<sup>10</sup> Furthermore, it is important that the cooperation is reassessed when there are concrete indications that the data provided by the services has played a part in the unlawful use of violence by the state of the foreign service receiving the data.

## Professionalism and reliability

The professionalism of the foreign service manifests itself among other things in its intelligence products or other operational results and its extent of organization. Reliability concerns the question whether the foreign service keeps to the agreements made, which in all cases include the third party rule.<sup>11</sup> How this criterion is assessed mainly depends on the experiences of the AIVD and/or the MIVD in their cooperative relationship with the foreign service in question and is sometimes difficult to assess where it concerns a new relationship. The opinions and experiences of friendly partner services are a further source of information. In line with the explanatory memorandum, the professionalism and reliability of a service are important factors when deciding whether or not to intensify a cooperative relationship.

## Legal powers and possibilities

This criterion is not discussed as such in the explanatory memorandum because it was included in the wording of the Act at a later stage of the parliamentary debate. The explanatory memorandum does indicate that in the context of transparency an assessment is made to what extent foreign services provide an insight into their tasks, powers and procedure. That assessment is made based on the CTIVD review report no. 38,<sup>12</sup> which recommends assessing cooperative relationships on transparency and specifying the considerations underlying the cooperation. This recommendation was made against the background of the revelations that Edward Snowden made about the practices of the NSA and the media reports on the alleged involvement of the AIVD and the MIVD in these practices. Specifying the considerations was deemed necessary because the investigation by the CTIVD showed that the services did not always have sufficient information on the legal powers and technical possibilities of their cooperative partners to justify the high levels of trust they placed in them. The recommendation therefore also means that the services must inform themselves on this aspect, in order to make reasoned choices about cooperation.

It can thus be inferred that there are two elements to this criterion:

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<sup>8</sup> Explanatory memorandum to the Intelligence and Security Services Act 2017, *Parliamentary Documents II* 2016/17, 34 588, no. 3, p. 160.

<sup>9</sup> CTIVD review report no. 50 on the contribution to targeting by the MIVD, *Parliamentary Documents II* 2016/17, 29 924, no. 144 (appendix), accessible at [www.ctivd.nl](http://www.ctivd.nl)

<sup>10</sup> In her letter of 26 September 2016, the Minister of Defence adopted this recommendation (*Parliamentary documents II* 2016/17, 29924 no. 144). In a letter of 19 May 2017, the director-general of the AIVD made a pledge to the CTIVD to also adopt the recommendation.

<sup>11</sup> The third party rule means that data is provided on the condition that the party who receives this data may not provide it to others (Section 65 of the ISS Act 2017).

<sup>12</sup> CTIVD review report no. 38 on the processing of telecommunications data by the AIVD and the MIVD, *Parliamentary Documents II* 2013/14, 29 924, no. 105 (appendix), available at [www.ctivd.nl](http://www.ctivd.nl)

1. An assessment of the foreign service's transparency, by seeing to what degree the required information about the foreign service is publicly available and, where relevant, to what extent the foreign service itself is willing to provide this information. The explanatory memorandum states on this point that insufficient transparency is a strong counter indication of cooperation.<sup>13</sup>
2. The provision by the AIVD or the MIVD of information about foreign service's legal powers and possibilities, so that the associated risks may be assessed.

One specific risk that could present itself is known as the roundabout route: that the AIVD or the MIVD could, by receiving data from or cooperating in practice with a foreign service, obtain information that was acquired in a way that is not permitted according to Dutch legal standards.

The safeguards that apply to data collection by the foreign service are an important aspect of this criterion. If there are adequate safeguards in place to prevent unjustified interference with fundamental rights, there are fewer risks attached to the operational cooperation or the receipt of information collected by the partner service.

An important consideration when providing data is to check whether the receiving foreign service has legal powers that are broader than customary for an intelligence and/or security service. Some services, for example, are authorized to take enforcement action against citizens. Some services also have criminal investigation powers so that data provided by the Dutch services could unintentionally be used in criminal proceedings.

### Level of data protection

The realization has grown over the past years that to protect privacy it is necessary to gain an insight into the way in which the receiving party (i.e. the foreign service) handles the data provided by the AIVD or the MIVD.<sup>14</sup> In its review report no. 48, the CTIVD therefore recommended that, when drafting the weighting note, the services consider the data protection system used by the foreign service in question. During the establishment of the ISS Act 2017, the CTIVD urged that the weighting notes would focus explicitly on how the receiving foreign service processes, stores and destroys data and which safeguards it applies. This criterion was added to the ISS Act 2017 in a memorandum of amendment (January 2017).

Where before the CTIVD characterized the collection of information as a best-efforts obligation, this has now become a result obligation on par with other legal cooperation criteria. That means that the AIVD and the MIVD must gather the information necessary to establish whether or not the foreign service in question has adequate safeguards in place for data protection. This is the result that counts. To gain a picture of the risks, it is not necessary to detail meticulously how these safeguards have been set up, but whether they exist and what the scope of their application is. This last factor is important to determine that safeguards for data protection also apply to the information that the foreign service obtains from its foreign partner services (i.e. from the AIVD or the MIVD) and whether these safeguards apply to non-residents of the country in question. The partner service is therefore not assessed generally in the area of data protection, but an examination must be carried out of the level of protection offered to the data that the AIVD or the MIVD may provide to the foreign service in future.

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<sup>13</sup> Explanatory memorandum to the Intelligence and Security Services Act 2017, *Parliamentary Documents II* 2016/17, 34588, no. 3, p. 161.

<sup>14</sup> The recent ruling by the European Court of Human Rights in the case *Centrum för Rättvisa versus Sweden* supports the point of view that the requirements of an equal or similar level of protection is one of the safeguards that could be significant when exchanging unevaluated bulk data. ECHR 19 June 2018, no. 35252/08, ECLI:CE:ECHR:2018:0619JUD003525208 (*Centrum för Rättvisa vs. Sweden*), Section 150.

The assessment of the criterion for the level of data protection concerns safeguards in the following areas:<sup>15</sup>

1. Purpose limitation (data processing must be linked to a specific purpose);
2. Data minimization (data processing must not go beyond that which is necessary for its purpose);
3. Retention periods;
4. Safeguards with respect to the quality of data (that the data is accurate, complete and up to date);
5. Safeguards with respect to the security of data against loss or unauthorized access, use, modification or destruction;
6. Observing the interests of the individuals involved (fair weighing of interests; proportionality);
7. Observing the rights of the individuals involved (for example –access – under conditions - to the data the service has on the individual in question); and
8. Independent, adequate and effective oversight of data protection.

These eight elements are each relevant to gain insight into how the foreign service handles data and thereby protects privacy. The weighting notes must indicate if these safeguards exist and the extent to which these apply to the data obtained from foreign partner services, including the data of non-residents of the country in question.

### Revision

The Act stipulates that, if circumstances so require, the nature and intensity of the cooperative relationship with a foreign service must be reassessed (Article 88(5) of the ISS Act 2017). The explanatory memorandum clarifies that the cooperative relationship can change both in a positive and in a negative sense. An example of a positive change is that a clearer picture of the professionalism and reliability can be obtained, the longer the relationship with the relevant foreign service exists. If that emerges from a new assessment, further reaching forms of cooperation can take place. Negative developments at the foreign service or in the country in question must also be expressed in a reassessment of the weighting note.

That implies that the AIVD and the MIVD must monitor developments in the countries with which they cooperate to assess if there are circumstances that give rise to a reassessment of the weighting note.

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<sup>15</sup> These elements are based on the description of the general principles of data protection in the experts' report that was drafted in the context of report 56. See Appendix IV to CTIVD review report no. 56 on the multilateral exchange of data on (alleged) jihadists by the AIVD, *Parliamentary Documents II 2017/18*, 29 924, no. 160 (appendix), accessible at [www.ctivd.nl](http://www.ctivd.nl)




## 4. Authorization level

Part of the renewed framework for cooperation with foreign services is a higher authorization level for entering into cooperative relationships. Under the ISS Act 2017, this power has been granted in principle to the minister instead of the head of service, regardless of whether it concerns a high-risk service or not.<sup>16</sup> The Act provides the additional option to mandate this power to the head of service. The requirement of ministerial authorization for entering into cooperative relationships is in line with the pledges made by the Minister of the Interior and Kingdom Relations and the Minister of Defence in June 2016 in a response to CTIVD reports 48 and 49. The CTIVD views it as an important safeguard that it is the minister who grants authorization for the cooperative relationships, because that means that an assessment is made at the highest political level - and outside the service in question - whether the identified risks are acceptable and what consequences these risks have for the cooperation. The CTIVD repeatedly put forward this position during the legislative procedure of the ISS Act 2017.<sup>17</sup>

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<sup>16</sup> Explanatory memorandum to the Intelligence and Security Services Act 2017, *Parliamentary Documents II* 2016/17, 34588, no. 3, p. 161.

<sup>17</sup> Response by the CTIVD on the draft Intelligence and Security Services Act 20XX (August 2015), *Parliamentary Documents II* 2016/17, 34 588, no 3 (appendix with identifier blg-787328) and CTIVD view on the ISS Act 20.. (November 2016). Both reports can be found on [www.ctivd.nl](http://www.ctivd.nl).



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