

A pair of silver scales of justice is centered in the image, set against a blue background featuring a world map and a network of white lines. A thick teal diagonal band with a white stripe runs across the top left. The scales are positioned as if weighing the world.

# Appendix II

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



## Deficiencies in the contents of the weighting notes

### 1. Deficiencies in the AIVD weighting notes

The review report shows that the AIVD weighting notes contain both structural and incidental deficiencies. The deficiencies that the CTIVD established are discussed in the following sections in order of most structural down to incidental.

#### 1.1 Level of data protection

The level of data protection is structurally inadequately assessed in the AIVD weighting notes. References to an applicable act are usually limited and fail to provide further explanation of the safeguards which that particular act contains and what these imply for the foreign service in question. Wherever further information is offered, the description given is mostly limited to generalizations such as: “contains rules on access to personal data and retention periods”. These cases lack any explanation of the content of those rules and clarification of whether the safeguard is adequate.

To say that there is ‘something’ in the way of data protection is not enough, without indicating whether there are adequate safeguards and how these relate to the Dutch safeguards. However hard it undoubtedly is to penetrate the legislation of other countries and to interpret the safeguards, this is, in the view of the CTIVD, necessary if the provision of personal and unevaluated data to those services is to be permitted. Safeguards for data protection can lie in policy and procedures of the foreign service, so these should, where necessary, also be included in the assessment. The AIVD must be aware of the extent of the risks in this area to be able to make a decision on the content of the cooperation. If it is impossible for the AIVD to obtain sufficient information about the safeguards for data protection from publicly available information, the CTIVD is of the opinion that the step should then be taken to question the partner service about this (see below in Section 1.2).

The CTIVD established that in fifteen weighting notes the information given about the safeguards for data protection that apply to data received from the AIVD was so meagre that it did not support the conclusion of ‘sufficient’.

To complete this criterion for CTG cooperation partners, the AIVD uses three standard clauses which are supplemented with limited information about the applicable legislation of the country in question. The CTIVD views this use of the clauses as careless because they do not add much in the way of substance and moreover paint an incorrect picture.

The first clause implies that the service in question has to abide by the rules that were drawn up in the context of CTG. The CTIVD's opinion expressed in its review report no. 56 - that multilateral safeguards for data protection in the context of CTG are inadequate - is not taken into account.<sup>1</sup> Only when specific written agreements have been made in a multilateral context will it be possible to speak of safeguards that are relevant to assess this criterion.

The second clause states, where it concerns NATO partners, that the foreign service in question has experience in exchanging confidential information in NATO context. The only comments about the agreements made in this context are that confidential information must be treated as such. In the CTIVD's view, the experience of the service is not very relevant. The aim of the weighting notes is to specify the particular safeguards in the area of data protection.

The third and last is a standard clause which refers to the CTIVD's review report no. 56 and states that the general principles for data protection have usually been transposed in national legislation and that the foreign service is assumed to respect this unless specific presented facts point to the contrary. This is an incorrect interpretation of the review report. The foreign service can only be assumed to observe general legal principles if these are transposed in legislation and/or in the policy and procedure of the foreign service. That cannot be assumed for non-codified legal principles. The starting point should therefore always be that the legislation of the country in question and/or the policy or procedure of the foreign service must include a specific safeguard.

## 1.2 Legal powers and possibilities

The CTIVD established that the AIVD weighting notes contain structural deficiencies where it concerns the interpretation of this criterion. Where the legislation of the country in question comments on the powers of the foreign service, the AIVD lists them but it usually makes no mention of which safeguards exist for the use of those powers. Generally speaking, the AIVD does address any crime-investigating or executive powers the foreign service may have and so this aspect of the criterion is sufficiently covered in the weighting notes.

In twelve cases the discussion of this criterion is so limited that in the opinion of the CTIVD there is no ground for the conclusion that it has been met.

The picture that emerges after studying the weighting notes is that the AIVD had no clear aim when interpreting this criterion. Simply listing the legal powers, if that is even done, says nothing about any associated risks. The primary concern is whether there are indications that the foreign service is authorized to collect data in a way that is unacceptable according to Dutch legal standards. That may be the case because the legal powers of the foreign service exceed those of the AIVD and the MIVD or because methods are used that are not permitted in the Netherlands or because there is a lack of safeguards that are seen as fundamental in the Netherlands for the use of those powers by the foreign service (see also the assessment framework in Appendix I to this report).

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<sup>1</sup> See CTIVD review report no. 56 on the multilateral exchange of data on (alleged) jihadists by the AIVD, *Parliamentary Documents II* 2017/18, 29924, no. 160 (appendix), accessible at [www.ctivd.nl](http://www.ctivd.nl)

The starting point for identifying the foreign service's legal powers and the safeguards that are relevant is the legal framework that applies and any other publicly available information. When these sources provide information about the powers and safeguards, an assessment of the risks can be made on that basis. If that is not the case, it may be necessary to question the foreign service specifically about this. The CTIVD considers the technical possibilities of the foreign service to be relevant when these are not aligned to the legal powers of the service or when they are deemed to be impermissible according to Dutch standards. If the AIVD has indications that this is indeed the case, the foreign service will need to be questioned about this.

In summary, the information required to interpret this criterion can come from either public sources or from the foreign service itself (or perhaps from the wider intelligence community). In both cases the transparency can be assessed. According to the CTIVD, this assessment must be reflected in the weighting notes, by focusing on the extent to which the required information was publicly available and, where relevant, on the willingness of the foreign service to provide that information.<sup>2</sup> That does not only apply to information about the legal powers and possibilities but also to information about the democratic anchorage of the service, the oversight and the safeguards for data protection. The CTIVD understands that there cannot be full transparency between the intelligence and security services, but a comparison in broad outlines of the legal powers and safeguards should at least be possible, in accordance with the European case law.

### 1.3 Targeting

Another structural shortcoming in the AIVD weighting notes is the consideration that has to be made in the context of the risk of contributing to illegal targeting.<sup>3</sup> When this topic is even addressed in the weighting notes, there is a complete lack of grounds for the conclusion that there is no risk. The CTIVD regularly encountered the reasoning that the foreign service in question was a national security service and that the risk that the data from the AIVD would be used for targeting in military missions was therefore highly unlikely. Other weighting notes pose that there are no indications that the information provided will be used for targeting purposes. Twelve weighting notes do not even mention the topic of targeting. The CTIVD established that in these cases the AIVD failed to comply with its undertaking to address in its weighting notes the possibility that information could play a role in a targeting process.<sup>4</sup>

The AIVD weighting notes do not follow the steps for a thorough assessment of targeting. The first step is to indicate to what extent 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. Both unilateral participation in armed conflicts and participation in multilateral missions where force is used are relevant but only in so far as the contribution made by the state relates to the use of force. If involvement or possible involvement in the use of force has been established, step two comes into play: are there reliable indications that this use of force does not comply with international standards?<sup>5</sup> If open sources (for example media reports) or intelligence sources reveal that the state uses unlawful force, i.e. illegal targeting, the weighting note must make mention of this. It does not have to be proven without a doubt that the use of force is indeed unlawful for it to be noteworthy. It is enough if the lawfulness can be questioned. Also relevant

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<sup>2</sup> The explanatory memorandum to the ISS Act 2017 indicates that in the context of transparency an assessment is made to what extent foreign services provide an insight into their tasks, investigatory powers and procedure. It can be said that 'fail' is a strong counter indication for cooperation. *Parliamentary Documents II 2016/17*, 34588, no. 3, p. 161.

<sup>3</sup> See the assessment framework in Appendix I to this report.

<sup>4</sup> Letter from the DG-AIVD to the CTIVD about review report no. 50 dated 19 May 2017.

<sup>5</sup> See the 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)

are the tasks of the foreign service in the area of the provision of information to the armed forces. That does not mean to say that there is no risk if the service does not have this particular task. Despite the agreement that the information received is not distributed to other parties (third party rule),<sup>6</sup> the risk that the data will contribute to illegal targeting cannot be considered to be negligible if the state in question (allegedly) participates in such practices.

The lack of a thorough assessment in the area of targeting is most felt where it concerns the foreign services of states that are involved in the use of force and where there are indications based on publicly available information that the use of force does not comply with international standards. This concerns a small number of services. In the weighting notes of some of those services, the AIVD has mentioned as 'point of concern' that the country may possibly be involved in practices that are in contravention of international law but fails to specify how this fact is weighed. In one of those cases the topic of targeting is not mentioned in the weighting note, and in another of those cases the indications that the use of force by the state in question may not comply with international standards are - wrongly - not addressed.

## 1.4 Democratic anchorage

The legal cooperation criterion (a) democratic anchorage pertains to the political system of the country and the position of the service within it (see the assessment framework in Appendix I to this report). The question relevant here is: are there sufficient democratic safeguards that the foreign service's activities remain within the set limits? This has to do with management of the service, the legal framework that regulates the service's conduct, parliamentary checks, independent oversight, independent judiciary and freedom of press. If the information in the weighting notes shows that these democratic safeguards are under pressure or are slipping, this must be weighed in the assessment of the foreign service's democratic anchorage.

The CTIVD established that the AIVD includes information that is relevant to assess this criterion in various places in the weighting notes, such as in the human rights criterion or in the description of the country. As a result, the assessment of the service's democratic anchorage was linked in many cases to only a part of the relevant information.

In three cases the CTIVD established that the weighting note as a whole portrays a negative image of the foreign service's democratic anchorage. It therefore cannot understand why this criterion was assessed as sufficient in the weighting notes. In its opinion, that conclusion is not supported by the content.

## 1.5 Professionalism and reliability

The criterion (c) professionalism and reliability provides, among other things, for the quality of the information about the service in question, about the extent to which the service is organized and about compliance with agreements on for example the use of the provided data.

In its investigation, the CTIVD found one case in which the weighting note painted an incorrect picture of the professionalism and reliability of the foreign service. When the weighting note was established by the DG-AIVD, the AIVD had been aware for some time that there was compelling negative evidence

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<sup>6</sup> 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).

for both the professionalism and the reliability of that service. However, that information was not recorded in the weighting note that was adopted by the DG-AIVD in March 2018. Both elements (professionalism and reliability) are assessed as sufficient because - according to the weighting note - there are no known incidents that would lead to a different assessment. The CTIVD was told that the compelling information in question was not included in the weighting note because the content was written before the AIVD became aware of this information. When the AIVD did learn of the matter in November 2017, the AIVD first wanted to clear up matters before the weighting note (which at that time had already been drafted) was amended. The reason was that the matter continued to evolve.

The CTIVD does not consider these arguments convincing. It is evident that it is the AIVD's responsibility to check when the weighting note is established whether the previously drafted text still paints a true picture and to amend it where necessary. It finds that the weighting note that was established by the AIVD in March 2018 lacked information that should have resulted in a negative assessment as regards the professionalism and reliability criterion (Section 88(3)(c)).

During the course of its investigation, the CTIVD repeatedly inquired after a reassessment of this weighting note. The revised weighting note in which the foreign service in question is designated a high-risk service based on that information has been ready for consultation and establishment as a draft since the spring of 2018. However, up to the time this report was drafted, it has still not been established.<sup>7</sup> The AIVD informed the CTIVD that it still does not have a full picture of the matter and is awaiting further information. The DG-AIVD informed the minister orally of this matter in July 2018 and the AIVD has now reduced the cooperation with this service to a minimum. To prevent any cooperative activities with this service by teams from the AIVD without the involvement of the Foreign Relations department, an email was sent to all managers involved in international cooperation. The service in question still participates in the database in the context of CTG, in which the AIVD shares personal data among other things.

The CTIVD considers the entire course of events to be unacceptable. Establishing a weighting note which was known internally to contain incorrect information in critical areas should never have occurred. The minister received the weighting note with the incorrect content for information purposes at the end of April. She was only informed of the matter three months later by the DG-AIVD, which means that in those three months the minister was unable to assume her political responsibility for decision-making about the implications for the cooperation. Furthermore, the CTIVD finds it unacceptable that the revised weighting note, in which this information is weighed, has still failed to be established. The CTIVD finds that the DG-AIVD failed in his legal duty of care to reassess the cooperation if circumstances give rise to do so.

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<sup>7</sup> In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations indicated that the weighting note in question has been revised.

## 2. Deficiencies in the MIVD weighting notes

In its review report the CTIVD comes to the conclusion that the MIVD weighting notes for CTG and sigint partner services contain a structural deficiency and several incidental deficiencies. These shortcomings are discussed in the following sections, in which the structural deficiency will be dealt with first, followed by the incidental deficiencies.

### 2.1 Level of data protection

The information provided in the MIVD weighting notes about data protection by the foreign partner service mainly concerns retention periods and information security. In all cases other relevant elements of data protection, such as the safeguards of purpose limitation or data minimization, are lacking. Generally speaking, oversight of data protection is not discussed either. As a result, the picture of the level of data protection is incomplete for all weighting notes.

The MIVD's view is that the assessment of the level of data protection corresponds with the total picture of the extent to which safeguards exist for the lawful conduct of the partner service. If this appears to be in order, the lack of retention periods for data, for example, would not automatically result in an 'insufficient'. The CTIVD understands that the full picture of the foreign service provides a context when assessing individual criteria, but it warns against focusing too much on the wider perspective. Data must be protected at an adequate level if an (extensive) exchange of data is to be permissible. That adequate level must be established objectively, based on certain benchmarks.

In six cases the CTIVD does not understand, on the basis of the information in the weighting note, the conclusion of the MIVD that the level of data protection for the information provided to those services was sufficient. The contents of those weighting notes provide too few reference points or too many questions remain unanswered. In those cases the content of the weighting note does not support the conclusion on that criterion.

### 2.2 Targeting

In its weighting notes, the MIVD expressly addresses the risk that cooperation could contribute to illegal targeting. The description of the country indicates whether or not there is any involvement in an armed conflict or military missions. If the country is indeed a contributor to one or more multilateral missions, an indication is generally given of whether that contribution entails the use of force. The human rights criterion then looks at whether the state has in the recent past been guilty of violations of human rights and/or humanitarian law. At the conclusion of the weighting note, this information is compiled in the assessment on targeting. The line taken by the MIVD is that if there is use of force in the context of a multilateral mission or an armed conflict and there are indications that this use of force does not comply with international standards, a disclaimer must in any event be added to all intelligence products that are shared. This disclaimer states that the information may only be used for intelligence purposes and not for purposes or in support of activities that result in a violation of international law. Subsequently an assessment must be made for each provision of data to the foreign service of whether this is acceptable, given the risk.

The CTIVD considers that the MIVD weighting notes leave open the possibility of providing data that could contribute to a process of targeting to foreign services of states regarding which there are indications that they fail to comply with international standards. In these situations, the safeguard



lies fully in the assessment made in each specific case of the provision of data. MIVD policy stipulates that if there is a lack of grounds under international law for the use of force or if there are any other violations of international law, the Minister of Defence must be asked for authorization to provide data which might realistically contribute to targeting. That means that data which due to its nature is suitable for contributing to targeting ('actionable intelligence') and which in addition has a connection with the current use of force may only be provided to the foreign services in question with ministerial authorization.

The CTIVD found that the MIVD is not consistent in its assessment of the risk of contributing to illegal targeting. A small number of foreign services with which the MIVD cooperates in the context of sigint belong to states regarding which there are indications that they do or did not keep to international standards when using force. In those weighting notes this is labelled a risk under the human rights criterion, but the outcome for the weighting differs. In one case it leads to a score of moderate on the human rights cooperation criterion, while in the other case that criterion is marked as sufficient with an almost identical line of reasoning.

In one case the weighting note fails to mention that publicly accessible information contains indications that international standards were violated in the use of force. The CTIVD cannot rule out that this information would have resulted in a different assessment of the human rights criterion. The weighting note must subsequently be supplemented and reassessed on this point.

## 2.3 Legal powers and possibilities

The CTIVD established that the MIVD interprets this criterion correctly in most cases. The legal tasks and powers are listed and the information known to the MIVD about the service's capacities is indicated. In addition, the safeguards that apply to the acquisition of intelligence are addressed. Finally, the MIVD reports whether or not the foreign service in question has criminal investigation powers and/or enforcement powers. When assessing this criterion, the MIVD generally reasons that although not much is known about the exact technical possibilities of the service, the legal powers and directly ensuing technical possibilities do not give rise to place restrictions on the cooperation. The CTIVD understands this line of reasoning. The object of this criterion is to rule out to a sufficient degree that data is collected or used in a way that is incompatible with Dutch legal standards. If legislation provides a picture of a service's powers and of the safeguards that apply to their use and these are sufficiently similar to those of the Dutch services, additional information about technical possibilities is not automatically required. Naturally that only applies if the MIVD does not have any indications that the technical possibilities go beyond what is necessary in connection with the legal powers of the service or that they are otherwise unacceptable according to Dutch standards.


Despite its largely positive view, the CTIVD established that one weighting note provides too little clarity about the safeguards that apply to the use of legal powers by the foreign service in question. In that case the content of the weighting note cannot support the conclusion that the criterion was met.

The CTIVD established that the MIVD weighting notes lack an explicit assessment of the transparency. This assessment could consist of an indication of the extent to which the required information was publicly available and, where relevant, the willingness of the foreign service to provide that information.<sup>8</sup> This does not only concern information about the legal powers and technical possibilities

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<sup>8</sup> The explanatory memorandum to the ISS Act 2017 indicates that in the context of transparency an assessment is made to what extent foreign services provide an insight into their tasks, powers and procedure. It can be said that insufficient transparency is a strong counter indication for cooperation. *Parliamentary Documents II* 2016/17, 34588, no. 3, p. 161.

but also information about the democratic anchorage of the service, the oversight and the safeguards for data protection. As indicated above for the AIVD, the CTIVD understands that there cannot be full transparency between the intelligence and security services, but a comparison in broad outlines of the legal powers and safeguards should at least be possible, in accordance with the European case law.



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