

Review report

On the use of the investigatory power of selection by the AIVD and the MIVD

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Review Committee
on the Intelligence and
Security Services

REVIEW REPORT

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Summary

The General Intelligence and Security Service (AIVD) and the Military Intelligence and Security Service (MIVD) are, in the context of exercising their duty to protect national security, authorized to intercept large amounts of data that are transferred by satellite and radio communications or cable. The extension of the investigatory power to also intercept large amounts of data on the cable was subject of public debate when the Intelligence and Security Services Act 2017 (ISS Act 2017) was introduced. The ISS Act 2017 provides rules for both the interception and processing of data.

Selection is the investigatory power which the AIVD and the MIVD use to learn the contents of data obtained through investigation-related interception. After selection, staff may access the contents of a phone conversation, for example. The Review Committee on the Intelligence and Security Services (CTIVD) investigated whether the investigatory power of selection had been used lawfully in the period from 1 May 2018 to 31 December 2018.

This investigation was prompted by the first progress report 'Functioning of the ISS Act 2017'. In its progress report, the CTIVD established that at that time the system of investigation-related interception presented a high risk of unlawful conduct as regards the implementation of the requirements of 'as targeted as possible' and 'data reduction'. The CTIVD examined a total of five investigations in greater depth and investigated the full use of the investigatory power. The CTIVD now establishes that the high risk of unlawful conduct did indeed become manifest to some extent. The requirement that selection must be as targeted as possible is not being applied sufficiently. However, this did not result in any unlawful conduct during the investigated period. Due to problems in the interception and selection chain, selection at the AIVD partly failed to take place. The MIVD failed to comply sufficiently with the requirement of data reduction in two investigations.

Policy and work instructions

The overall view of policy development relating to the use of the power of selection shows that the AIVD and the MIVD have taken significant steps in developing policy and work instructions during the investigated period. Particularly following the investigated period from 1 May 2018 to 31 December 2018, a great deal of work was done which culminated in a joint policy for selection in the spring of 2019.

Authorization for the use of the power of selection

The CTIVD established that during the investigated period, the AIVD and the MIVD filed dozens of requests to use selection on data intercepted through investigation-related interception of satellite

and radio communications. The investigatory power of selection was only used after authorization by the responsible minister and the Review Board for the Use of Powers (TIB).

In September 2018 an incident occurred in which, due to technical issues, AIVD staff accessed some content data without the proper authorization. This is unlawful. The AIVD detected this issue itself, reported it and took appropriate measures.

Authorization to establish selection criteria

The minister or the head of the service grants authorization to establish selection criteria for a person, organization or topic. The head of the service may mandate the authorization to establish selection criteria to a subordinate. The AIVD and the MIVD have different ways of organizing this internal authorization but both methods require improvement.

For the purpose of its internal authorization, the AIVD should provide a clearer overview of the selection criteria (including substantiation) and the link to a person, organization or topic. In two investigations, the MIVD failed to obtain adequate internal authorization to establish selection criteria. This is unlawful. The MIVD incorrectly interpreted the option of a submandate.

Compliance with the requirement 'as targeted as possible'

The requirement of selection being as targeted as possible is implemented by providing the most specific description possible of persons, organizations or topics at which the use of the power of selection is aimed and by the substantiation of the connected selection criteria. The MIVD in particular addressed this requirement in an effective way.

The AIVD on the other hand failed in one investigation to substantiate why it concerned an 'organization'; the entity at which the power of selection was aimed. The selection of the intercepted data ultimately did not take place so that unlawful conduct did not manifest itself. The CTIVD recommends that the AIVD describe the organizations at which the power of selection is aimed in greater detail in its request to the minister and the TIB.

The CTIVD established that the MIVD implemented the use of keywords in as targeted a way as possible. However, the CTIVD does recommend that the MIVD substantiates the use of a keyword as a selection criterion more emphatically and clarifies the connection between the keyword and a person, organization or topic in greater detail.

Compliance with data reduction

Data reduction is the obligation to destroy data that is not relevant to the current investigation or any other ongoing investigation that falls under the services' tasks. To do this, the information obtained must first be examined for relevance.

The CTIVD established that the AIVD complied with the data reduction requirement in two investigations where data was in fact selected. The MIVD has a well-functioning technical system for selection that provides for careful registration of the implementation of the power of selection and selection criteria. The way in which the data reduction requirement is implemented, however, needs to be improved. The MIVD wrongfully failed to destroy non-relevant data in two investigations. This is unlawful.

1. Introduction

The power to intercept large amounts of data ‘on the cable’ has been extensively discussed in public debate. In the context of the Intelligence and Security Services Act 2017 (ISS Act 2017) and the advisory referendum on the ISS Act 2017, the debates showed that there were public concerns about the expansion of the power of ‘investigation-related interception’, also known as ‘bulk interception’. One of these concerns was that personal details of citizens would end up in the services’ databases.

Through this investigation, the Review Committee on the Intelligence and Security Services (CTIVD) offers a greater understanding of the process and functioning of the investigatory power of selection. The CTIVD assessed the lawfulness of the use of this investigatory power in the period from 1 May 2018 to 31 December 2018.

The power of selection

Selection is the investigatory power used by the General Intelligence and Security Service (AIVD) and the Military Intelligence and Security Service (MIVD) to learn the contents of data obtained through investigation-related interception.¹ Selection is carried out with a view to learning the content of the selected data and to subsequently reviewing it for relevance to the investigation for the purpose of which the selection took place.²

The investigatory power of selection allows AIVD and MIVD staff to listen to, for example, an intercepted phone call. The use of the power of selection relates to persons, organizations or topics which the services investigate to protect national security, based on the Integrated Intelligence and Security Services Order.

Background to the investigation and investigative questions

This investigation was prompted by the first progress report ‘Functioning of the ISS Act 2017’.³ In its progress report, in response to the conducted baseline measurement, the CTIVD established that the system of investigation-related interception presented a high risk of unlawful conduct regarding the implementation of the requirements ‘as targeted as possible’ and ‘data reduction’. The power of selection is part of the system of investigation-related interception.

The requirement ‘as targeted as possible’ means that an investigatory power is exercised in the most targeted way possible.⁴ The reduction of data in investigation-related interception and selection follows from Section 48(5) of the ISS Act 2017, which stipulates that data obtained through investigation-related interception must be assessed for relevance. When certain data is assessed as non-relevant after selection, it must be destroyed immediately.

In its second progress report ‘Functioning of the ISS Act 2017’, the CTIVD established that the AIVD and the MIVD had made significant progress in developing policy, describing work processes and work instructions.⁵ The most notable progress is that the requirement ‘as targeted as possible’ has been implemented, as well as the obligation to reduce data in investigation-related interception as a whole

1 Section 50(1)(a) of the ISS Act 2017.

2 *Parliamentary Documents II* 2016/17, 34588, no. 3, p. 107.

3 The first progress report (CTIVD report no. 59 (2018)) was sent to the House of Representatives on 4 December 2018.

4 See Article 5 of the Policy Rules of the ISS Act 2017, *Parliamentary documents I* 2017/2018, 34588, no. 1.

5 The second progress report (CTIVD report no. 62 (2019)) was sent to the House of Representatives on 11 June 2019.

and in selection as a part of that. The new policy also contains a clear description of the different steps in the process of the system of investigation-related interception.⁶

The current review report presents the results of the review whether the investigatory power of selection has been used lawfully in the period covered by the first progress report.

The investigative question is as follows:

Did the AIVD and the MIVD lawfully use the investigatory power of selection in the period from 1 May 2018 to 31 December 2018?

This core question can be subdivided into the following sub-questions:

- *How was the power of selection applied in the investigated period? (chapter 2).*
- *What are the legal requirements to use the investigatory power of selection? (assessment framework, appendix I).*
- *Does the current practice meet these requirements? (chapter 3 (AIVD) and chapter 4 (MIVD)).*

The investigation method used is described in appendix II to this report.

Public report and classified appendix

The public report lists the shortcomings and unlawful conduct that were established in the implementation of the power of selection by the AIVD and the MIVD. In light of protecting national security, further details relating to the reviewed investigations by the services have been described in a classified appendix. The classified appendix is brief (7 pages).

Timeline of the investigation

The current review report was drafted on 3 July 2019. The Minister of the Interior and Kingdom Relations and the Minister of Defence were subsequently given the opportunity to respond to the findings in the review report.

The responses of the Minister of the Interior and Kingdom Relations and the Minister of Defence were received on 28 August 2019. As a result of their responses, some amendments were made and clarification given. The review report was adopted on 4 September 2019.

Structure of the report

The review report has the following structure. Chapter 2 contains a brief explanation of the power of selection and how the AIVD and the MIVD implement that power. In chapter 3, the CTIVD reviews the current practice of the power of selection by the AIVD. The same lawfulness assessment is made for the MIVD in chapter 4. Chapter 5 contains the conclusions and recommendations based on the investigation. The assessment framework has been included in appendix I. Appendix II concerns the investigation methodology used. Appendix III details the development of policy regarding selection in investigation-related interception while appendix IV provides the definitions.

⁶ See the extensive Appendix III (Development of policy for the power of selection).

2. What is the power of selection?

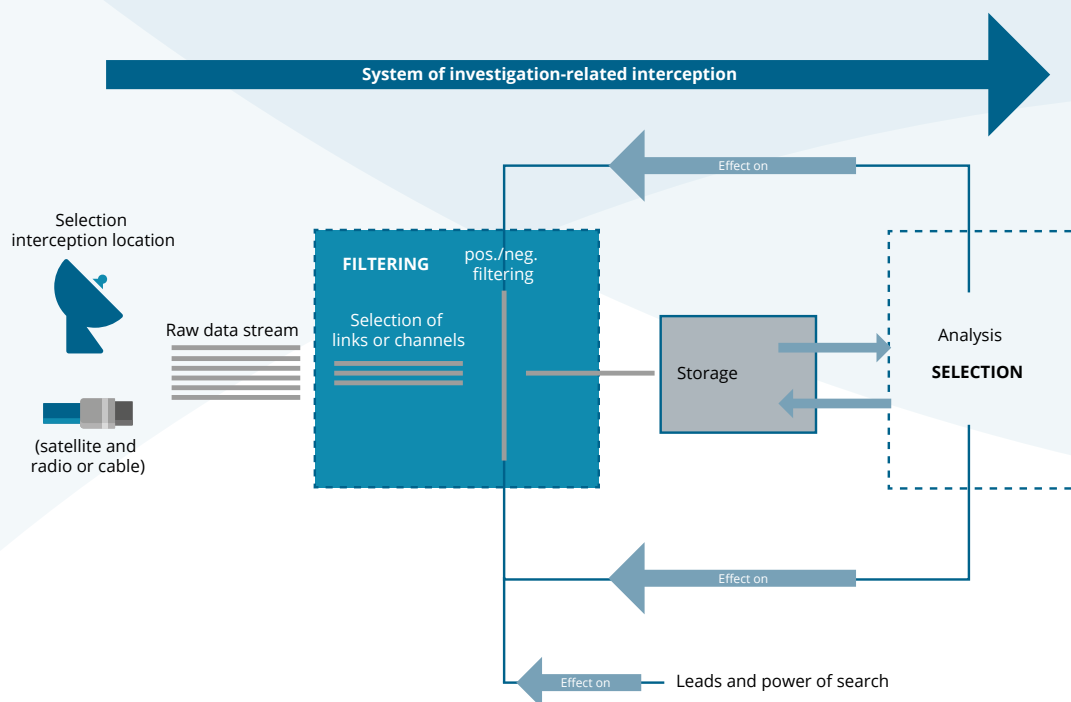
Selection is the use of the investigatory power to learn the content of selected data obtained through investigation-related interception. The investigatory power of selection by the AIVD and the MIVD is a complex process, which is why this chapter first describes the implementation process. The lawfulness assessments based on the findings in practice are described for the AIVD in chapter 3 and for the MIVD in chapter 4. The current chapter answers the sub-question of how the AIVD and the MIVD implemented the power of selection.

The chapter is structured as follows. Section 1 explains the role of the power of selection within the system of investigation-related interception. Section 2 describes the various responsibilities and internal authorization mechanisms for using the power of selection at the AIVD. Section 3 describes the various responsibilities and internal authorization mechanisms for using the power of selection at the MIVD. The chapter ends with an interim conclusion.

2.1 The power of selection within the system of investigation-related interception

Investigation-related interception can be divided into the following three stages: (1) the interception of communication (Section 48 of the ISS Act 2017) by the Joint Sigint Cyber Unit (JSCU), (2) the optimization of the interception and selection process (Section 49 of the ISS Act 2017) and (3) the analysis of the content of communication and metadata (Section 50 of the ISS Act 2017). The assessment framework (appendix I) discusses the legal framework for the system of investigation-related interception in detail. The CTIVD recently investigated how the filters applied in the system of investigation-related interception functioned.⁷

The current investigation focuses on the lawfulness of the power of selection, which is part of stage 3. Figure 1 shows the place of the power of selection within the system of investigation-related interception.



⁷ See also CTIVD report no. 63 (2019).

Figure 1 shows that selection occurs in stage 3 (analysis) of the system of investigation-related interception. If requested by the head of the AIVD or the MIVD, the minister may grant authorization to apply selection on data collected through investigation-related interception. That request should contain the identity of the person or organization in respect of which the power of selection is being used (Section 50(2) in conjunction with Section 50(1)(a) of the ISS Act 2017). The Review Board for the Use of Powers (TIB) then conducts its lawfulness assessment of the authorization granted by the Minister of the Interior and Kingdom Relations or the Minister of Defence to use the power of selection.⁸ This authorization is valid for no more than three months but can be extended.

In practice, selection takes place with the use of *selection criteria*. Selection criteria are for example telephone numbers or email addresses connected with a target. It could also be keywords related to a specified person, organization or topic that is the subject of an AIVD or MIVD investigation. Selection criteria are mainly derived from data the services already have on known targets or from other sources, such as partner services. These selection criteria may also be derived from intelligence gathered through other investigatory powers, such as the hacking power, collecting data from open sources, the power to receive data from informants or operations by agents.

The *persons, organizations and topics* that are the subject of the power of selection must be described in the authorization application to use the power of selection. This application is then submitted first to the minister involved and, if authorization is granted, to the TIB. The selection criteria corresponding to the persons, organizations or topics described in the application do not need to be submitted to the minister or the TIB.

Determining and using selection criteria is a power delegated to the services. The power to establish selection criteria based on Section 50(3) of the ISS Act 2017 lies in principle with the minister but may be mandated to the head of the relevant service. The head of the service may further mandate the authorization for establishing selection criteria to a subordinate civil servant. The choice and use of selection criteria by both services is subject of the lawfulness assessment conducted by the CTIVD.

2.2 Procedure for the power of selection at the AIVD

At the AIVD, processers are responsible for drafting the authorization request to use the power of selection as well as for drafting the selection criteria. In the request the processers include a substantiation for the selection criteria with information such as the origin or source of the selection criteria. The connection between the selection criteria and the persons, organizations or topics must also be recorded. This is in fact an implementation of the requirement to use this power in as targeted a way as possible.⁹

The AIVD has a so-called chain of control set up for the process of obtaining authorization for using the power of selection, drafting the selection criteria for that use and removing or adding selection criteria. This procedure is to ensure that the selection criteria used are monitored continuously.

⁸ Figure 1 also shows that the investigatory powers for the different stages in the system of investigation-related interception are interrelated. Selection criteria also act as a 'positive filter' to store intercepted data (see also CTIVD report no. 63 (2019)). Furthermore, based on the application of automated data analysis in Stage 3, new selection criteria may emerge that could contribute to identifying unknown targets or to the interception of data relating to a known target. This interaction can be expressed in a combined application for the relevant investigatory powers. For selection that concerns Section 49(2) in conjunction with Section 50(1)(a) of the ISS Act 2017 (the investigatory power of search aimed at selection combined with selection)

⁹ See Sections 3.2 and 4.2.

This chain of control firstly regulates the authorization process for a request for authorization to use the power of selection (Section 50(1)(a) of the ISS Act 2017) and ensures that the process of determining the selection criteria for that use (Section 50(3) of the ISS Act 2017) runs smoothly. When requesting authorization to use the power of selection (Section 50(1)(a) of the ISS Act 2017), a fixed line of authority must be followed. The first authorization is granted by the head of team, after which the head of unit and subsequently the legal affairs department grant their authorization. They also check the persons, organizations or topics named in the request. The authorization request to use the power of selection is then submitted to the director-general of the AIVD and the Minister of the Interior and Kingdom Relations. And lastly, the authorization request is sent to the TIB for a lawfulness assessment.

The authorization procedure to *establish* the selection criteria (Section 50(3) of the ISS Act 2017) corresponding to a person, organization or topic also follows a fixed line of authority. After being drafted by the processor and provided with a substantiation, the selection criteria are submitted to the head of team. The selection criteria are then put to the head of unit, who ultimately grants authorization based on an internal submandate decision. Only after the head of unit has granted authorization may the selection criteria actually be used and the data from investigation-related interception be examined.

The CTIVD has established that the authorization process for the use of the power of selection and the authorization to establish the selection criteria is in line with the law. The CTIVD examined the selection lists in three of the AIVD's investigations in greater depth. In addition, the CTIVD was given an demonstration of how the selection criteria are entered into the AIVD's technical systems with the accompanying steps so that it could gain a better understanding of the process. The CTIVD established that in one of the three investigations, the lists of selection criteria with the corresponding persons were insufficiently clear, during the investigated period, for the superior who had granted authorization. It must be sufficiently clear to the responsible head of unit what the requested authorization relates to. That resulted in the following recommendation:

Recommendation 1:

Draft the request to establish selection criteria in such a way that it provides a clear overview of the selection criteria, the substantiation and the link to person, organization or topic.

After authorization is granted to use the selection criteria, the selection criteria are entered into a technical system and are thus activated, so that they register which substantive data from investigation-related interception must be set apart. The selected result of the investigation-related interception is made available to the AIVD's operational team. Members of this team are then able to examine the content of the selected data, for example by listening to a telephone conversation. If this yields relevant information, the result is passed on to the rest of the team and is processed into a product for the interested government authority (this may be a ministry, for example). In other words, the team uses the information to conduct the investigation assignments.

Authorization to use the power of selection is requested every three months. This also includes checking which selection criteria no longer yield any results, after which the AIVD decides whether these criteria should be removed. This is done at the processor's discretion. The legal affairs department is involved to the extent that they are aware of the selection criteria linked to a person, organization or topic and are able to advise on criteria that do not yield results.

2.3 Procedure for the power of selection at the MIVD

The procedure of granting authorization to use the power of selection (Section 50(1)(a) of the ISS Act 2017) follows a fixed line of authority. The authorization request is submitted in succession to the head of team, the head of department, the head of JSCU, the legal affairs department of the MIVD and finally to the director of the MIVD. Once the director of the MIVD has authorized the request, it is submitted to the legal affairs directorate of the Ministry of Defence and the desk of the General Secretary, after which it will go to the Minister of Defence. Finally the authorization granted by the minister will be submitted to the TIB for a lawfulness assessment.

The MIVD's authorization requests to use the power of selection focus on organizations, among other things.¹⁰ Specific persons are linked to these organizations, and further selection criteria are then linked to these persons, such as a telephone number. There is also an authorization procedure to link these persons to the organizations concerned.¹¹ The data analyst determines the persons 'to be linked' and provides adequate substantiation. A JSCU staff official or an MIVD legal officer checks the substantiation and approves the link, providing it meets the requirements. Only then does it become possible to link one or more selection criteria to these persons.

The MIVD has a so-called chain of control set up for the process of obtaining authorization to use the power of selection, linking people to organizations and removing or adding selection criteria. However, an adequate internal authorization procedure to *establish* the selection criteria is still lacking. Section 50(3) of the ISS Act 2017 stipulates that selection criteria are established by either the minister concerned or by the head of service on his behalf. The head of the service may mandate the authorization to establish selection criteria to a subordinate official. It is not the intention that executive staff members are authorized to establish selection criteria in the operational process themselves.

However, at the MIVD, an internal submandate decision states that data analysts may draw up and establish the selection criteria. Data analysts draw up the selection criteria and provide a substantiation and link to persons, organizations or topics. The source or origin of the selection criterion is also specified. The data analysts enter the selection criteria into the system that performs the selection. There is no review by a superior official or an official from outside the operational process. As explained above, the law requires that the authorization is granted by another official than the executive official.

Nonetheless, the process in which broad selection criteria, such as keywords, are authorized is in line with Section 50(3) of the ISS Act 2017. When using selection criteria, such as keywords, that could generate a lot of additional data (causing collateral intrusion), the substantiation is reviewed by a different employee than the one who established the selection criteria. In this case the authorization to establish selection criteria is in accordance with legislation.

The lack of an authorization procedure to establish selection criteria (not 'broad selection criteria') based on Section 50(3) of the ISS Act 2017 resulted in the following recommendation:

Recommendation 2:

Appoint an official at a sufficiently high level within the line of authorization or outside the operational process (such as a legal officer) to grant authorization to establish selection criteria.

¹⁰ See Section 4 of the assessment framework (appendix I) for the use for 'organizations' and the power of selection.

¹¹ Based on Section 50(3) of the ISS Act 2017.

After the data analyst has entered the selection criteria into a technical system, the authorized staff may access the content of the selected data. The data concerns the content of text messages or phone conversations, for example. The relevant results are passed on to the team and processed into intelligence products for the interested government authority (such as a ministry).

2.4 The process of selection in brief

The Minister of the Interior and Kingdom Relations or the Minister of Defence and the TIB assess the request for authorization to use the power of selection based on the *persons, organizations* and *topics* described in the request (Section 50(1)(a) of the ISS Act 2017). The responsibilities and internal authorization requirements when submitting the authorization request are allocated to different positions at the AIVD and the MIVD. The power of selection results in the use of selection criteria in the technical systems of the AIVD and the MIVD.

The authorization to establish selection criteria belonging to a person, organization or topic (Section 50(3) of the ISS Act 2017) lies in principle with the minister but may be mandated to the head of the relevant service. The head of the service may further mandate the authorization to establish selection criteria to a subordinate.

At the AIVD the procedure to authorize the selection criteria has been allocated within the organization in accordance with legislation. However, how the substantiation of the selection criteria is implemented and how the list of selection criteria with corresponding persons, organizations or topics is presented to the mandate holder requires improvement.

Given the fact that the AIVD has opted to allocate this responsibility to the heads of unit (managers in the service's primary process who are in charge of multiple teams), the overview presented for authorization must be clear and self-explanatory. The CTIVD recommends that the AIVD describes the persons, organizations or topics the power of selection is aimed at in greater detail and substantiates the selection criteria sufficiently and presents this clearly for authorization.

The MIVD has a technical system in place that supports the procedure for selection adequately. In addition, the MIVD has opted to subject the linking of individuals to the organizations they are part of to internal authorization. The CTIVD views this as an extra safeguard in addition to the legal requirements. But the MIVD's authorization procedure to establish selection criteria for previously authorized persons, organizations and/or topics is not sufficient because a superior official or someone from outside the operational process should grant authorization.

3. Assessment of the AIVD's practice

In this chapter, the CTIVD answers the question whether the AIVD applied the power of selection lawfully in practice during the period investigated.

Appendix I of the assessment framework illustrates the legal requirements against which the CTIVD reviews the power of selection. In summary the requirements are:

- **Authorization** by the Minister of the Interior and Kingdom Relations or the Minister of Defence and lawfulness assessment by the TIB to use the power of selection for the purpose of investigation assignments.
- Application of the **general requirements** of necessity, proportionality and subsidiarity in the requests to use the investigatory power of selection.
- The power of selection must be conducted in **as targeted a way as possible**.
- The application of **data reduction** in the use of the power of selection.
- Compliance with the **duty of care** in the use of the power of selection.

Through interviews and file research, the CTIVD was able to obtain an overall view of the policy, procedures and work instructions and of how the use of the power of selection functions in practice. The above legal requirements were reviewed more specifically based on the practice of three investigations in which the AIVD used the power of selection. These investigations are representative of the AIVD's procedure. A brief explanation of the context of the investigations:

- *Investigation 1 (AIVD)*: this concerns a counterterrorism investigation.
- *Investigation 2 (AIVD)*: this concerns an investigation aimed at combating cyber espionage by a state actor.
- *Investigation 3 (AIVD)*: this concerns an investigation aimed at obtaining intelligence about foreign countries relating to a foreign governmental organization for Dutch interested government authorities.

The chapter is structured as follows. Section 1 provides an overall view of compliance with the general requirements in the use of the power of selection. In Section 2 the CTIVD reviews compliance with the requirement of selection being 'as targeted as possible' and in Section 3 compliance with the data reduction requirement. The chapter ends with an interim conclusion.

3.1 Compliance with general requirements - Overall view of the AIVD

After assessing dozens of requests, the CTIVD established that the AIVD clearly describes the operational necessity and link to the investigation assignments in its requests to use the power of selection. The use of the power of selection takes place in the context of an investigation assignment to be conducted that is formulated on the basis of the Integrated Order and the legal task of the service.

In the authorized requests, the AIVD substantiates why the use of the investigatory power is deemed necessary, proportional (in proportion to the infringement of the right to privacy of the parties involved), subsidiary (less far-reaching investigatory powers are not available to reach the same result) and as targeted as possible. In recent requests it also refers to the results of the investigatory power used in the past. This information is important, not least because it explains how the investigatory power is used in as targeted a way as possible. In other words, the AIVD has shown an improvement

in its requests to use the power of selection in the first six months after the ISS Act 2017 entered into force on 1 May 2018.

Distinction between metadata and content

Investigation 2 concerns interception and selection of internet-related communication. The CTIVD established that in general it is hard to distinguish between metadata and substantive data where it concerns internet-related data. In their joint policy for investigation-related interception, the AIVD and the MIVD developed a definition for metadata and content. The CTIVD is able to concur with this definition in broad outlines. For those situations where there is doubt if a type of data is metadata or content, a procedure was developed which involves the legal affairs departments of the services in deciding whether the type of data or a protocol should be categorized as metadata or content.

The CTIVD also established that the technical distinction is made for an increasing number of protocols and data types, but was unable to concur with the choice to categorize 'cookies' and all 'URLs' unequivocally as metadata. In these two cases it is possible to deduce a search query from the data so that the information type should be categorized as substantive information. In future, categorizing substantive information from internet-related communication as metadata – where the power of selection is not applied – should be avoided.

In its investigation, the CTIVD did not find any cases where making this distinction resulted in unlawful conduct in practice. Only investigation 2 concerned interception and selection of internet-related communication. In investigation 2 the selection of *all data*, therefore including metadata, was categorized as content and the power of selection was used to access that content. That means that the highest possible safeguards were applied and AIVD staff only accessed this information to perform their tasks after using the power of selection. This is *lawful*.

Considering the above, the CTIVD deems it important that the services continue in their efforts to make a deliberate distinction between 'content' and 'metadata' in internet-related information, because if it concerns content, additional safeguards apply in the form of a division of positions and roles and the power of selection. In new cases where there is doubt as to the correct classification, the distinction must not only be made after the fact, in accordance with the procedure, but the distinction should also be established in advance where possible, as the services design their technical infrastructure and make accessible the internet-related traffic. The necessity to distinguish between metadata and content will become more pressing given the future use of investigation-related interception 'on the cable', because more internet-related traffic will be selected. That resulted in the following recommendation:

Recommendation 3:

Be alert when making a distinction between metadata and content in the services' technical systems as this requires proactive and continuous consideration.

Selection issues at the AIVD

The CTIVD established that the AIVD filed dozens of requests to use selection on data intercepted through investigation-related interception of satellite and radio communications. The investigatory power of selection was only used after authorization by the responsible minister and lawfulness assessment by the TIB. During the period investigated, the AIVD was shown to have accessed some intercepted substantive information in September 2018 without having first obtained the necessary authorization, because of technical issues in part of the interception and selection chain. Accessing the content of data from investigation-related interception without authorization to use of the power of selection is *unlawful*.

The director-general of the AIVD decided shortly afterwards to temporarily deny the request to extend the power of selection for those investigations in which the technical problems occurred during the selection process. The AIVD set up a workgroup to solve the technical issues step-by-step for the use of the power of selection and informed the TIB and the CTIVD of the problems. The CTIVD established that in the period between 1 May 2018 and the time the issue was discovered in September 2018, the AIVD had failed to monitor these technical systems adequately. The high risk of unlawful conduct as a result of a limited implementation of the duty of care, as worded in the first progress report, manifested itself in practice. After a clear picture had been formed of the issue, the director-general was informed, who took immediate measures in December 2018.

3.2 Compliance by the AIVD with the requirement ‘as targeted as possible’

This requirement means that the use of the power of selection by the service must be as targeted as possible. When the power of selection is used, this requirement is put into effect by the most specific description possible of persons, organizations or topics and how the selection criteria are substantiated. From the perspective of this requirement, selection is most targeted when aimed at a person, followed by selection of an organization. The organization must be clearly described and the selection must be substantiated.¹² Lastly, the use of the power of selection can be aimed at a certain topic in the context of an investigation assignment.

When substantiating the selection criteria, it must be clear what the source or origin is of the connection between the selection criterion and the person, organization or topic. In addition, the substantiation may justify the type of selection criterion used for selection if there is reason to do so. For example, when selection criteria such as keywords or geographical information are used that may generate a great deal of additional data (causing ‘collateral intrusion’), additional substantiation is required to explain how this unintentionally gathered information will be limited as much as possible.¹³

Lawfulness assessment of investigations

The CTIVD assessed the lawfulness of a total of three AIVD investigations. In two of those (investigations 2 and 3), compliance with the requirement of selection being as targeted as possible was sufficient. The organizations against which the power of selection is aimed were adequately described in these authorization requests and the selection criteria were adequately substantiated in the selection list or in the additional interviews the CTIVD held with the staff members involved. Despite the selection issues at the AIVD, selection regarding investigations 2 and 3 was able to take place during the period investigated because it was carried out using other technical systems.

However, as regards investigation 1, the CTIVD considers compliance with the requirement ‘as targeted as possible’ to be insufficient. This investigation focused on the theme of counterterrorism. The authorization request lacked a clear description of the organization against which the power of selection was used. In addition, the nature of the formulated group was broadly defined by the AIVD and the request failed to describe why this group was considered an organization. The organization was not clearly described and the reason for even considering it an organization was not adequately substantiated, and as a result the AIVD failed to fully comply with the requirement of making the selection as targeted as possible. Although the request was authorized in advance by the minister and the TIB, the CTIVD established in retrospect that compliance with the requirement of as targeted selection as possible had not been fully met. The CTIVD reviews the conduct of the services as a whole

¹² See also Section 4 of the assessment framework (appendix I).

¹³ See also Section 4.2 of this report.

and monitors if they comply with legal requirements.¹⁴ Following its investigation, the CTIVD informed the TIB about its findings in the context of legal uniformity. The TIB acknowledged these findings.¹⁵

In addition, the list in investigation 1 of selection criteria belonging to persons who, according to the AIVD, form part of the organization in question was unclear and of insufficient quality. The reason for this is that the list contains persons who cannot reasonably be expected to yield relevant results for the investigation. In particular it concerns targets that are deceased or detained in custody in the Netherlands. It is conceivable that in the case of deceased targets, a certain technical selection criterion will be used by another possible target. This can be established through the power of search aimed at selection. However, when a technical characteristic of this kind is kept in the selection without further substantiation, it does not meet the requirement of selection that is as targeted as possible. This also applies to persons already detained in custody in the Netherlands but whose technical characteristic remains in the list of selection criteria. It is unlikely that this technical characteristic will be used by the person it corresponds to. The (proposed¹⁶) use of the power of selection in regard to these persons and the corresponding selection criteria was not – nor in the additional interviews with staff involved in the investigation – adequately substantiated.

The CTIVD is of the opinion that the requirement of selection that is as targeted as possible was not met. The selection of the intercepted data ultimately did not take place because of technical issues. As no information was selected in the investigation, *no unlawful conduct* was found.

Recommendation 4:

When using the power of selection on an organization, substantiate why this is considered an organization and why the selection is as targeted as possible. Provide an additional substantiation if selection criteria are used that cannot reasonably be expected to yield relevant results for the investigation.

3.3 Compliance by the AIVD with data reduction

Data reduction is the obligation to destroy data that is not relevant to the current investigation or any other ongoing investigation that falls under the services' tasks. To do this, the data obtained must first be examined for relevance. Data that is relevant is labelled 'relevant' and may be processed further, whereas data that is not relevant is labelled 'not relevant' and must be destroyed. If it is not, or not yet, clear if data is relevant, it is labelled 'relevance unknown' and may be stored for no more than three years. If the data has not been assessed for relevance in that time, it must be destroyed later when the three year period expires. Encrypted data may be stored for no more than three years as long as it has not been decrypted. That term may be extended each time by three years. After decryption, the 'regular' storage term of three years applies.¹⁷

Based on the three investigations by the AIVD (investigations 1, 2 and 3), the CTIVD formed a lawfulness opinion about how the AIVD conducted data reduction when using the power of selection.

¹⁴ See *Parliamentary documents I* 2016/2017, 34599, C, pp. 20-21 and the diagram in *Parliamentary Documents II* 2016/17, 34588, no. 3, p. 52.

¹⁵ From 30 May 2018 — a month after it was founded — the TIB called attention to the description of organizations and assessed various granted authorizations as unlawful because the description of the organization was inadequate. One of those assessments of unlawfulness concerned the later use of another investigatory power regarding the organization referred to here. The authorization request in investigation 1 is from before this period.

¹⁶ Given the fact that selection ultimately failed to take place due to technical reasons.

¹⁷ See also Section 5 of the assessment framework (appendix I).

Investigation 1

The CTIVD established that selection did not in fact take place in a number of AIVD investigations, due to technical issues concerning the use (see Section 3.1). One of these is the counterterrorism investigation (investigation 1) that was reviewed by the CTIVD. Because selection did not take place, data reduction was not conducted either.

In a number of investigations, selection was carried out – despite the selection issues – because technical systems were used other than those in which the selection issues presented themselves. This was the case in both investigations 2 and 3.

Investigation 2

The CTIVD established that in investigation 2 part of the result was categorized as relevant prior to selection and another part of the result was reviewed for relevance afterwards. In the context of the power of selection, the relevance assessment can generally only take place once the content of the selected data has been accessed. When data is categorized as relevant in advance, this is done without first accessing the content of that selected data. In that case, the relevance assessment is brought forward and therefore takes place at an earlier stage. The CTIVD does not exclude a procedure where data is declared relevant in advance but does point out that it should not be the basic principle as this type of procedure is only reserved for exceptional situations, in which case the procedure must be set up with sufficient safeguards. Both the AIVD and the MIVD now share this viewpoint and are consulting with the CTIVD about how this should be implemented in the policy about data reduction in the context of selection.¹⁸

The CTIVD investigation showed that the part of the result that had been declared relevant beforehand consisted of data selected based on targeted selection criteria of a highly specific nature. In the opinion of the CTIVD, this highly specific nature justifies the procedure within this specific operation where data was declared relevant beforehand. Therefore the CTIVD assesses the fact that a specific part of the selected results in investigation 2 was categorized as relevant beforehand as *lawful*. The result of the other selection criteria that were used for selection in the context of this investigation was categorized as ‘not yet assessed’. These results must be destroyed no later than three years after acquisition. At the AIVD the data in this investigation is destroyed automatically after one year by the technical systems if the result has not been assessed for relevance by that time. This is *lawful*.

Investigation 3

The use of the power of selection in investigation 3 was aimed at obtaining intelligence about a foreign government organization. The result was assessed for relevance after use of the power of selection. Relevant data was stored and non-relevant data was destroyed. This is *lawful*.

3.4 Interim conclusion regarding the AIVD

The AIVD adequately substantiated the necessity, proportionality and subsidiarity of the use of the power of selection. The operational necessity and the link with investigation assignments was clearly described in the requests. The CTIVD perceived an improvement in the quality of the authorization requests to use the power of selection in Section 50(1)(a) of the ISS Act 2017, including by reporting past selection results.

¹⁸ See also p. 9 of the second progress report (CTIVD report no. 62 (2019)).

However, the CTIVD established that the AIVD accessed the content of intercepted data without requesting the necessary ministerial authorization and without a lawfulness assessment by the TIB. This is *unlawful*. After the AIVD itself noticed the unlawful selection, it set up a working group to solve the problems in the investigation-related interception chain and selection chain on a step-by-step basis. In the spring of 2019, interception and selection within the system of investigation-related interception recommenced. According to the CTIVD, the incident shows that internal control mechanisms are crucial to identifying these sorts of incidents and tackling these problems.

The CTIVD established that internet-related data was intercepted in one investigation. In the investigation all data was categorized as content and the power of selection was used to access that content. The distinction between metadata and substantive data is harder to make where it concerns internet-related data. This will become a more pressing problem given the future use of investigation-related interception 'on the cable'.

In one of the three AIVD investigations reviewed, compliance with the requirement of making selection as targeted as possible was inadequate. The organization targeted by the use of the power of selection coupled with the established selection criteria were inadequately described. Given that no actual selection took place in the investigation due to the technical problems, conduct in this case was not unlawful. When using the power of selection in regard to an organization, the AIVD must substantiate why it considers this an organization and why the selection is as targeted as possible. In addition, further substantiation is required if selection criteria are used that cannot reasonably be expected to yield relevant results for the investigation.

Due to the selection problems, no selection occurred in investigation 1 and no data reduction was conducted as a result. In the other two investigations, the AIVD complied with the obligation to reduce data after using the power of selection.

4. Assessment of the MIVD's practice

In this chapter, the CTIVD answers the question whether the MIVD applied the power of selection lawfully in practice during the period investigated.

Section 7 of Appendix I of the assessment framework shows the legal requirements against which the CTIVD reviews the power of selection. In summary, the requirements are the following:

- **Authorization** by the Minister of the Interior and Kingdom Relations or the Minister of Defence and the TIB to use the power of selection for the purpose of investigation assignments.
- Application of the **general requirements** of necessity, proportionality and subsidiarity in the requests to use the investigatory power of selection.
- The power of selection must be conducted in **as targeted a way as possible**.
- The application of **data reduction** in the use of the power of selection.
- Compliance with the **duty of care** in the use of the power of selection.

Through interviews and file research, the CTIVD was able to obtain an overall view of the policy, procedures and work instructions and of how the use of the power of selection functions in practice. The above legal requirements were reviewed more specifically based on the practice of two investigations in which the MIVD used the power of selection. These investigations are representative of the procedure used by the MIVD. The context of the investigations is as follows:

- *Investigation 4 (MIVD)*: this concerns an investigation aimed at obtaining intelligence about a mission zone where the military is active.
- *Investigation 5 (MIVD)*: this concerns an investigation aimed at obtaining intelligence about foreign countries to protect national security.

Section 1 provides an overall view of compliance with the general requirements in the use of the power of selection. In Section 2 the CTIVD reviews compliance with the requirement of selection being as targeted as possible and in Section 3 compliance with the data reduction requirement. The chapter ends with an interim conclusion.

4.1 Compliance with general requirements - overall view of the MIVD

The CTIVD established that, in the dozens of requests it examined, the MIVD provided extensive substantiation for the use of the power of selection. The link with investigation assignments is unambiguous and clear reference is made to the results of past selection. In addition, this explanation offers the necessary context for the review on the basis of the general requirements. As with the AIVD, the MIVD showed an improvement in its requests to use the power of selection in the first six months after the ISS Act 2017 entered into force.

In its first progress report, the CTIVD perceived a high risk of unlawful conduct regarding compliance by the MIVD with its duty of care.¹⁹ The CTIVD established that in the period investigated, no technical control mechanisms were built in that addressed compliance with the duty of care in the context of the power of selection. Hence, the MIVD failed to sufficiently comply with the duty of care. As also

¹⁹ See CTIVD report no. 59 (2018).

indicated in the second progress report into the functioning of the ISS Act 2017, the MIVD is now working on implementing the duty of care further.²⁰

The CTIVD did establish, however, that the MIVD has a technical system that conducts the power of selection with the necessary care and registers all actions in accordance with legislation. The system facilitates a clear overview of persons, organizations or topics in regard to which the power of selection is implemented.

Authorization for the use of the power of selection

Based on the two investigations, the interviews held with MIVD staff and study of the requests, the CTIVD established that the MIVD only used the power of selection (Section 50(1)(a) of the ISS Act 2017) following authorization by the minister and a lawfulness assessment by the TIB.

Authorization to establish selection criteria

In investigations 4 and 5, the MIVD failed to obtain adequate internal authorization to establish selection criteria. This is *unlawful*. The MIVD incorrectly interpreted the option of a submandate. An internal submandate decision determines that an executive staff member may grant authorization to establish selection criteria. The aim of Section 50(3) of the ISS Act 2017 is that internal authorization is granted, based on a substantiated request to that effect, to an executive staff member by a superior or an official not involved in the operational process.²¹

The recommendation was made in chapter 2 that the head of the MIVD should appoint an official at a sufficiently high level within the line of authorization or outside the operational process (such as a legal assistant) to grant authorization to establish selection criteria.

4.2 Compliance by the MIVD with the requirement 'as targeted as possible'

This requirement means that the use of the power of selection by the service must be as targeted as possible. When the power of selection is used, this requirement is put into effect by the most specific description possible of persons, organizations or topics and how the selection criteria are substantiated.

When substantiating the selection criteria, it must be clear what the source or origin is of the connection between the selection criterion and the person, organization or topic. In addition, the substantiation may justify the type of selection criterion used for selection if there is reason to do so. For example, when selection criteria are used such as keywords or geographical information that may generate a great deal of additional data (causing 'collateral intrusion'), additional substantiation is required to explain how this unintentionally gathered information will be limited as much as possible.

When using keywords, the chance of collecting additional data (leading to 'collateral intrusion') is greater than with the use of more targeted selection criteria. An additional procedural step to destroy non-relevant data therefore stands to reason. A combination of keywords and links with other selection criteria may make the investigatory power more targeted in its use. When using a keyword, the substantiation must clearly explain how this keyword is connected to the person, organization or topic in question and how the requirement of making the selection as targeted as possible is implemented.

²⁰ See CTIVD report no. 62 (2019).

²¹ See also Section 2.3.

When using geographical data as selection criteria, the requirement 'as targeted as possible' may for example be applied by making the geographical region selected as small as possible and only accessing the substantive information within that region.

Lawfulness assessment

The CTIVD assessed the lawfulness of two of the MIVD's investigations. In one of those, the MIVD used keywords as a criterion. As indicated above, the substantiation must show how the keywords are used as a criterion to select in as targeted a way as possible.

The CTIVD established that in one of the investigations it examined, the keywords were linked to organizations regarding which authorization was granted to use the power of selection. The request to use the power of selection and the substantiation given for the keywords as selection criteria failed to adequately show how they are connected to the organization to which the keywords are linked. In other words: there was no clear substantiation of why a certain keyword belongs to the organization in question. The CTIVD also established that a source reference or reference of origin in the use of the keywords as selection criteria was lacking. During the investigation, staff were able to explain the underlying objectives of the keywords and the source or origin. The selection based on those criteria was thus justified at a later stage.

The CTIVD did not establish any *unlawful conduct* relating to compliance with the requirement of making selection as targeted as possible at the MIVD. The investigation did show, however, that the MIVD must improve its substantiation when using keywords as selection criteria. Therefore the following recommendation was given:

Recommendation 5:

Substantiate the use of a keyword more emphatically and clarify the connection between the keyword and a person, organization or topic in greater detail.

4.3 Compliance by the MIVD with data reduction

Data reduction is the obligation to destroy data that is not relevant to an investigation or any other ongoing investigation that falls under the services' tasks. To do this, the data obtained must first be examined for relevance. Data that is relevant is labelled 'relevant' and may be processed further, whereas data that is not relevant is labelled 'not relevant' and must be destroyed immediately. If it is not, or not yet, clear if data is relevant, it is labelled 'relevance unknown' and may be stored for no more than three years. If the data has not been assessed for relevance in that time, it must be destroyed later when the three year period expires. Encrypted data may be stored for no more than three years as long as it has not been decrypted. That term may be extended each time by three years. After decryption, the 'regular' storage term of three years applies.²²

Based on interviews with staff, a work instruction and its specific implementation, the CTIVD established that certain selected data was in fact considered 'non-relevant' by the MIVD. Destruction of that data is thus legally required. The ISS Act 2017 stipulates in Section 48 that data established not to be relevant to an investigation or any other investigation must be destroyed immediately. During the period investigated, none of the above-mentioned selected data (that was considered 'non-relevant') was destroyed through the technical system or in any other way. This is *unlawful*. The MIVD thus failed in its duty to conduct data reduction.

²² See also Section 5 of the assessment framework (appendix I).

The selection of data through keywords is made through other specific technical systems. In so far as data was selected using keywords, the non-relevant data was destroyed and relevant data was rightly declared to be of importance. A very minor part of the selected data was found to be relevant and was subsequently processed further. The remainder of the selected results was labelled 'relevance unknown' and will be stored for no more than one year. The CTIVD considers this procedure to be *lawful*.

Recommendation 6:

Destroy the data that had already been categorized as non-relevant during the investigation period.

4.4 Interim conclusion regarding the MIVD

The MIVD adequately substantiated the necessity, proportionality and subsidiarity of the use of the power of selection. The operational necessity and the link with investigation assignments was clearly described in the requests. The CTIVD perceived an improvement in the quality of the authorization requests to use the power of selection in Section 50(1)(a) of the ISS Act 2017, including by reporting past selection results.

The MIVD has extensive procedures in place to use the power of selection and to deal with the selection criteria. The CTIVD did establish that the MIVD wrongly interpreted the possibility in Section 50(3) of the ISS Act 2017 to submandate the authorization to establish selection criteria. This resulted in two investigations (investigations 4 and 5) lacking adequate internal authorization and the selection criteria being both drawn up and established by a data analyst. The lack of internal authorization is *unlawful*.

The CTIVD made the recommendation in chapter 2 that the head of the MIVD should appoint an official at a sufficiently high level within the line of authorization or outside the operational process (such as a legal assistant) to grant authorization to establish selection criteria.

The CTIVD did not establish any unlawful conduct at the MIVD regarding compliance with the requirement of selection being as targeted as possible in either investigation, but does recommend that the MIVD, when using a keyword as a selection criterion, pays more attention to the connection between the keyword and a person, organization or topic and the source reference.

The MIVD has a technical system that conducts the power of selection with the necessary care and that registers all actions in accordance with legislation. The system facilitates a clear overview of persons, organizations or topics regarding which the power of selection is implemented. In practice, however, the obligation to conduct data reduction when using the power of selection was not executed properly. The CTIVD established that the MIVD failed to destroy selected data categorized as 'non-relevant' for an investigation. That is a failure to comply with the data reduction requirement and is therefore *unlawful*.

5. Conclusions and recommendations

5.1 Conclusions

1. General requirements

From 1 May 2018, the AIVD and the MIVD have used the power of selection by selecting data obtained from investigation-related interception. The necessity to use the power of selection was sufficiently expressed, according to the CTIVD.

The CTIVD established that in general it is hard to distinguish between metadata and substantive data where it concerns internet-related data. However, this distinction is necessary because the safeguards from the ISS Act 2017 of ministerial authorization and/or division of positions and roles must apply when substantive data from investigation-related interception is accessed. The necessity to distinguish between metadata and content will become more pressing given the future use of investigation-related interception 'on the cable'. In one of the five reviewed investigations, internet-related data was intercepted and selected. In that case, all data was treated as content which meant the power of selection was lawfully used.

At the AIVD some substantive data was accessed without the required authorization based on a request to use the power of selection. This occurred in September 2018 and was due to technical problems in a part of the interception and selection chain. The TIB and the CTIVD were informed about these problems. The AIVD conducted an internal investigation into the issue and took measures. Accessing the content of data from investigation-related interception without the required authorization or a lawfulness assessment by the TIB is unlawful.

At the MIVD there was no adequate internal authorization to establish selection criteria in two investigations. This is unlawful. The MIVD incorrectly interpreted the option of a submandate. An internal submandate decision determines that executive staff members may grant authorization to establish selection criteria themselves.

2. Compliance with requirement 'as targeted as possible'

In one investigation, the AIVD's approach was not 'as targeted as possible'. The authorization request lacked a clear description of the organization regarding which the power of selection was used. In addition, the nature of the formulated group was broadly defined by the AIVD and the request failed to describe why this group was considered an organization. The organization was not clearly described and the reason for even considering it an organization was not adequately substantiated, and as a result the AIVD failed to fully comply with the requirement that selection is as targeted as possible.

This investigation also included selection criteria pertaining to people in an organization that cannot reasonably be expected to yield relevant results for the investigation. In particular it concerned targets that are deceased or detained in custody in the Netherlands. If the power of selection is nonetheless expected to yield useful results, this must be substantiated further. This substantiation was lacking.

However, the selection of the intercepted data ultimately did not take place because of technical issues. As no data was selected in the investigation, no unlawful conduct was found. The AIVD did use selection in its investigations 2 and 3 because that selection took place through other technical systems. The AIVD's method in these two investigations was sufficiently targeted.

The MIVD's method in the reviewed investigations was sufficiently targeted and thus the requirement of selection being as targeted as possible was met. Despite faults in substantiating the use of keywords as selection criteria in one investigation, interviews with the MIVD showed that the use of those selection criteria was sufficiently targeted and justified. When using keywords, it must be clearly substantiated how the approach is as targeted as possible and the selection must be carefully made whether to link the keyword to a person, organization or topic. The CTIVD did therefore not establish any unlawful conduct relating to compliance with the requirement of choice being as targeted as possible at the MIVD.

3. Compliance with data reduction

The AIVD's conduct in the investigations reviewed relating to the data reduction requirement was lawful.

The CTIVD concluded that the MIVD's conduct was unlawful in two investigations because it failed to sufficiently comply with the data reduction requirement. Data obtained by an investigatory power which does not appear to be relevant must be destroyed immediately according to legislation. In two investigations the selected data categorized as 'non-relevant' was wrongly not destroyed. The technical system at the MIVD does not provide for the possibility to automatically destroy non-relevant data. Nor was the data destroyed in any other way. This is unlawful.

4. Policy, processes and instructions

In appendix III, the CTIVD looks in more detail at the policy and work instructions of the AIVD and the MIVD regarding the power of selection. The overall view of policy development relating to the use of the power of selection shows that the AIVD and the MIVD have taken significant steps in developing policy and work instructions during the investigated period. Particularly following the investigated period from 1 May 2018 to 31 December 2018, a great deal of work was done which culminated in a joint policy for investigation-related interception in the spring of 2019. In the joint policy relating to investigation-related interception, important parts, such as the implementation of the requirement 'as targeted as possible', data reduction and the distinction between metadata and content, were elaborated further. This policy is being supplemented and developed into work instructions.

5.2 Recommendations

1. Procedure to establish selection criteria

AIVD:

Draft the request to establish selection criteria in such a way that it provides a clear overview of the selection criteria, the substantiation and the link to person, organization or topic.

MIVD:

Appoint an official at a sufficiently high level within the line of authorization or outside the operational process (such as a legal officer) to grant authorization to establish selection criteria.

2. Content vs. metadata

AIVD and MIVD:

Be alert when making a distinction between metadata and content in the services' technical systems as this requires proactive and continuous consideration.

3. As targeted as possible

AIVD:

When using the power of selection in regard to an organization, substantiate why this is considered an organization and why the selection is as targeted as possible. Provide an additional substantiation

if selection criteria are used that cannot reasonably be expected to yield relevant results for the investigation.

MIVD:


Substantiate the use of a keyword more emphatically and clarify the connection between the keyword and a person, organization or topic in greater detail.

4. Data reduction

MIVD:

Destroy the data that had already been categorized as non-relevant during the investigation period.





Oranjestraat 15, 2514 JB The Hague
P.O.Box 85556, 2508 CG The Hague

T 070 315 58 20 | **F** 070 381 71 68
E info@ctivd.nl | www.ctivd.nl