

REVIEW COMMITTEE
ON THE INTELLIGENCE AND SECURITY SERVICES
(CTIVD)

ANNUAL REPORT

2010 - 2011

The annual report covers the period that ended on 31 March 2011.

Table of contents

Introduction	5
Chapter 1 The reporting year in broad outline	7
- General	7
- In-depth investigations	7
- Systematic monitoring	8
- Complaints	9
- Working procedure of the Committee	11
- Regular contacts	12
Chapter 2 The conduct of DISS with respect to two suspended employees	13
Chapter 3 The performance by GISS of its foreign intelligence task	17
Chapter 4 The obligation to notify: an ongoing debate	21
Chapter 5 Recommendations and their follow-up	25
Chapter 6 International contacts	29
APPENDIX I.	
The Committee (background)	31
APPENDIX II.	
Overview of review reports	39
APPENDIX III.	
Review report on the performance by GISS of the foreign intelligence task	43

ANNUAL REPORT 2010-2011

Introduction

The Review Committee for the Intelligence and Security Services (CTIVD) conducts its investigation activities for the purpose of closely monitoring the whole range of activities of the intelligence and security services. Over the years the Committee has developed an investigative practice enabling it to oversee a large part of the daily activities of the services. The services are not static, however; they are in a continuous process of change. Whenever the services shift their areas of attention and working methods, this immediately affects the work of the oversight body.

In his letter on the outlines of the General Intelligence and Security Service (GISS) year plan for 2011, the minister of the Interior and Kingdom Relations states that new terrorist threats may develop in an entirely unpredictable way, within a short period and from the outside (exogenously).¹ Radicalized individuals with no or hardly any connections to known networks in Europe may be provided with training or instructions in areas of turmoil that are difficult to access, such as the Horn of Africa or the border area between Pakistan and Afghanistan. This makes it difficult to predict which targets they wish to hit. The minister writes that against this backdrop GISS will invest in exploratory investigations and international cooperation and in increasing its own operational effectiveness in and in relation to foreign countries.

On 28 January 2011 the Second Chamber of Parliament agreed to an integrated police training mission in the Afghan province of Kunduz. With this mission the Dutch government intends to make a contribution to the training of the civilian police force in northern Afghanistan. During the intensive consultations between the government and the Second Chamber the importance of ensuring the security of the personnel deployed was discussed at great length. In the debate the minister of Defence said that Defence Intelligence and Security Service (DISS) would actively put out its feelers in Kunduz.² The minister drew attention to the good exchange of information between DISS and other intelligence services. He stated that it was precisely in Afghanistan that much had been gained as regards reciprocity in recent years.

¹ *Parliamentary Papers II 2010/11*, 30 977, no. 39.

² *Parliamentary Papers II 2010/11*, 27 925, no. 423, p. 94.

Though each of the two developments mentioned above has its own dynamics, both pose new challenges not only to the intelligence and security services, but also to their oversight body. Activities taking place far from home, in an unsafe area and, when the occasion arises, in cooperation with local or other foreign partners call for a different oversight methodology than, for example, the telephone tapping of a local network of radicalized youngsters. With its limited staff the Committee faces the challenge of following the services wherever they go, constantly examining the intractable reality against the legislative and regulatory parameters. In addition, the regular, often domestic activities of the services continue to be subjected to the critical scrutiny of the Committee.

In this changing and at times unexplored territory the Committee considers it its task to arrive time and again at a sound opinion. In this report it renders account for the manner in which it performed this task in the past year.

Chapter 1

The reporting year in broad outline

General

The Review Committee for the Intelligence and Security Services (CTIVD, further referred to as: the Committee) reviews whether the intelligence and security services GISS and DISS perform their tasks lawfully. For this purpose the Committee conducts in-depth investigations resulting in review reports, monitors certain activities of the services and acts as complaints advisory committee in the case of complaints about the services. The Committee is an independent government body.³

The Committee is composed of three members. At the moment they are:

- Mr. A.H. van Delden, chairman
- Mr. E.T. van Hoorn, member
- Ms. S.J.E. Horstink-von Meyenfeldt, member

The Committee is supported by a staff, composed of a secretary to the Committee, Mr. N. Verhoeven, four review officers and an administrative adviser. The Committee is now in the process of recruiting a fifth review officer.

In-depth investigations

In the reporting year the Committee started or completed a number of large investigations at GISS and DISS. This year it was possible to make good progress with these investigations, which relate to the more concealed activities of the services. Contrary to the preceding year, this year there were no new affairs causing commotion in parliament and the media. Such affairs easily affect the progress of ongoing investigations because of the Committee's limited capacity.

The Committee issued two reports preceded by large, in-depth investigations. One is a report on the conduct of DISS with respect to two (then) suspended employees (see section 2) and the other a report on the performance by GISS of its foreign intelligence

³ See appendix I for a more detailed account of the Committee.

task (see section 3). The public parts of the second report are included in an appendix to this annual report (appendix 3).

Two in-depth investigations of the Committee are nearing completion. One is an investigation into the official messages of GISS and the other an investigation of the activities of DISS in the field of signal interception. The reports resulting from these investigations are expected to be issued shortly after the publication of this annual report. In addition to these, five large investigations are currently 'ongoing': an investigation of the classification of state secrets by GISS, an investigation into the cooperation of DISS with foreign services, an investigation of the official messages of DISS and two investigations whether the commitments made by the ministers concerning the steps to be taken by the ministers in reaction to previous recommendations of the Committee with respect to the two services have been fulfilled. Furthermore, the Committee announced in September 2010 that it would convert its monitoring of the exercise by GISS of its wiretapping and signal interception powers into an annual in-depth investigation. The Committee has thus deepened its investigation of the exercise of these powers and its reports can henceforth give the Second Chamber a better insight into the activities and findings of the Committee relating to this important part of the work of GISS. The first report will cover the period from September 2010 through August 2011 and will probably be prepared in the last quarter of 2011.

Finally, on 14 March 2011, after contacts on the matter with the chairman of the Standing Committee on Foreign Affairs, the Committee started an investigation into the role of DISS and GISS in an evacuation mission in Libya, which led to three Dutch military being held for some time. This investigation has not been completed yet. As early as 23 March 2011, however, at the request of the Second Chamber the Committee sent a letter containing a number of conclusions regarding the preparation and execution of the evacuation mission. The Second Chamber discussed the letter with the ministers concerned in the public debate on 29 March 2011.

Systematic monitoring

In the reporting year the Committee continued its systematic monitoring of a number of subjects. These are:

- exercise of the wiretapping power by DISS;
- performance of security screenings by GISS and DISS;⁴

⁴ *Persons who hold or will hold a position involving confidentiality must undergo a security screening.*

- processing of applications for inspection of files by GISS;⁵
- performance of the obligation to notify by GISS and DISS.⁶

The first monitoring activity concerns the exercise of the wiretapping power by DISS only because – as stated above – the exercise of this power by GISS is the subject of an in-depth investigation.

Monitoring activities are done mainly by random inspections. The organisation and scope of the random inspections enable the Committee to obtain a representative picture of a number of core activities of the services.

The results of the monitoring may give the Committee cause to start an in-depth investigation. When the Committee considers it necessary, moreover, it will contact the services or the minister concerned in response to its findings. This may be about actual cases as well as policy matters. In the reporting year the Committee corresponded with the management of both services about aspects of the notification policy at GISS, the conduct of security screenings by both services and the procedural safeguards in respect of telephone taps at DISS. So far the nature of the matters discussed has not given the Committee reason to inform the minister concerned and/or the Second Chamber.

Complaints

A person who wants to complain about GISS or DISS must lodge the complaint with the minister of the Interior and Kingdom Relations or the minister of Defence, respectively. The minister then calls in the Committee as an independent advisory complaint committee. The Committee assumes full charge of handling the complaint. It hears persons concerned in the matter and examines the files of the service in question. The Committee submits an advisory opinion to the minister, following which the minister takes the ultimate decision. If the minister departs from the Committee's advisory opinion, the advisory opinion must be sent to the complainant.

In the reporting year the Committee handled seventeen complaints, sixteen regarding GISS and one regarding DISS. With regard to one (other) complaint about GISS the Committee advised the minister of the Interior and Kingdom Relations not to handle the complaint.

⁵ *Individuals file applications for inspection of files in order to try and access a file held by GISS or DISS. In the next reporting year the Committee will again do a random check, this time at DISS.*

⁶ *Five years after certain special powers have been exercised the services must examine whether the person with regard to whom the power was exercised can be informed thereof. This is the obligation to notify. See section 4 for further details.*

In regard to ten complaints concerning GISS the Committee advised the minister of the Interior and Kingdom Relations to declare the complaint manifestly ill-founded. In the opinion of the Committee it was immediately clear from the relevant complaint notices that there could not be any reasonable doubt about the opinion that in each case the complaint was manifestly ill-founded.

In regard to four complaints concerning GISS the Committee advised the minister of the Interior and Kingdom Relations to declare the complaint ill-founded. In these cases the complainants were unable to present a prima facie case concerning the matters about which they complained and neither did the Committee find any other evidence of any improper conduct of GISS in regard to the complainants.

In regard to one complaint concerning GISS the Committee found that it had not been established that the complaint was well-founded. This means that the complainant and GISS had given different versions of what happened and that the Committee had found it impossible to find out what actually happened.

In regard to one complaint concerning GISS and one complaint concerning DISS the Committee advised the minister concerned to declare the complaint partly well-founded. The complaint regarding GISS was about an interview in which the service confronted the complainant with certain information in order to make him stop his activities. It is the opinion of the Committee that the service went further than was strictly necessary. The case regarding DISS involved an omission to make and lay down clear agreements with the complainant. The Committee found, however, that the nature of the negligence did not give rise to liability for any alleged damage.

In all cases the ministers concerned followed the Committee's advisory opinion, while it is noted that in one case the minister of the Interior and Kingdom Relations has not yet taken a decision in reaction to the advisory opinion.

In the preceding annual report the Committee mentioned two complaints (one concerning GISS and one concerning DISS) regarding which it had advised to declare the complaint partly well-founded, but on which the minister concerned had not yet taken a decision. Meanwhile decisions have been taken. In both cases the minister concerned followed the Committee's advisory opinion. The GISS case was about a security screening carried out with insufficient expedition while the complainant had been inadequately informed about the progress of the screening. In the case concerning DISS the service had omitted to assess certain security risks the complainant might run.

Apart from the above the Committee also exercises oversight over complaints not taken up by the minister concerned. The Committee reviews whether the decision not to take up a complaint was taken on proper grounds.

In an earlier annual report the Committee reported that time limits for handling complaints were systematically exceeded. In response it both tightened its internal procedure and urged the responsible ministers to forward complaints and decide on the Committee's advisory opinion more expeditiously. It has now emerged that there has been a reduction in the systematic exceeding of time limits in the reporting year. Both the two ministers and the Committee contributed to this reduction. In the cases not handled within the statutory time limit the cause for this failure lay in the complexity of the complaint and/or the fact that dealing with it was a time-consuming affair. In those cases the complainant was informed of the delay. The Committee has the impression that it is impossible to prevent time limits from being exceeded without affecting the quality of complaint handling in those cases.

Working procedure of the Committee

The Committee has established that in the past few years investigations at DISS took a great deal more time than at GISS and that the Committee was less able to verify that it gets to see all information. The Committee considers this situation definitely undesirable.

The Committee stated that it wished to obtain direct access to a number of digital disks on which the employees of DISS store their information, but for quite a while DISS refused to give such access. The service told the Committee that it had problems with such a procedure since the information stored on the disks comprised not only approved information, but also personal notes. The Committee took the position, however, that it is certainly capable of distinguishing between approved and non-approved (personal) documents. Indeed, it has experience with doing so. The law provides, moreover, that the Committee must be given direct access to the information processed under the Intelligence and Security Services Act 2002 (ISS Act 2002) and the Security Screening Act. Thus, the legislature has expressed that an oversight body must be able to determine its working procedure itself and may not be dependent on the service it oversees if it is to be able to properly perform its statutory tasks.

On 6 December 2010 the Committee informed the minister of Defence of the problem. The matter was also discussed at a consultation with the Standing Parliamentary Committee on Defence. On 28 February 2011 the Committee received a letter from the director of DISS in which he committed himself to give the Committee access to the disks in question. Personal notes from employees were to be removed from the disks, following which the Committee's access to the disks was to have been realised by 14 March 2011.

At the close of the reporting year the Committee will review in cooperation with DISS whether the director's commitment has been properly implemented.

In all other respects the Committee again obtained the full cooperation of GISS and DISS in this reporting year, just as in the preceding years.

Regular contacts

The Committee meets on a regular basis with the Second Chamber, the ministers concerned and the heads of both GISS and DISS. On 14 November 2010 the Committee discussed its annual report with the Standing Parliamentary Committee for the Interior and Kingdom Relations. On 9 December 2010 it discussed the state secret aspects of its findings with the Committee on the Intelligence and Security Services. (ISS Committee). The Committee had a meeting with the Standing Parliamentary Committee on Defence on 12 January 2011, at which the annual report and some current matters came up for discussion.

On 28 April 2010 the Committee spoke with minister Hirsch Ballin of the Interior and Kingdom Relations. On the same day it consulted with minister Van Middelkoop of Defence. On 30 November 2010 the Committee met with minister Donner of the Interior and Kingdom Relations. The chairman of the Committee was introduced to minister Hillen of Defence. There were two consultative meetings with the heads of GISS and of DISS. The matters discussed at these meetings include the reports issued, ongoing investigations and the results of the Committee's monitoring activities.

On 1 July 2010 the Committee met with prime minister Balkenende. On 28 July 2010 it also met with the secretary-general of the ministry of General Affairs, the latter *inter alia* in his capacity as coordinator for the intelligence and security services.

Chapter 2

The conduct of DISS with respect to two suspended employees

Early in 2009 the first newspaper reports appeared about two suspended employees of DISS, who accused the service of negligent, and even unlawful conduct towards them. Questions about the matter were put to the minister of Defence in parliament. Further publications followed and members of parliament also continued to ask questions, which caused the minister of Defence to request the Committee, on 12 May 2009, to investigate the matter. The minister not only requested the Committee to investigate whether the conduct of DISS with respect to the two suspended employees had been lawful, but also the possible measures that could prevent such situations in the future, as well as certain measures already taken within DISS. Even after the Committee had started its investigation, various publications concerning the matter continued to give rise to questions in parliament.

The Committee conducted an extensive investigation at DISS. On 27 August 2010 the (then) minister of Defence sent the report to the Second Chamber, thereby making it public.⁷

The Committee established in the report that substantial, legitimate interests had been at stake in the conduct of DISS in the relevant investigations with respect to the two employees, who were suspended at the time. It is the opinion of the Committee that in a number of cases DISS did not act in accordance with the provisions of current legislation and regulations. Furthermore, DISS did not make the correct choices in all cases. The Committee observed at the same time, however, that there was no evidence that the integrity of the service should be doubted.

The Committee established that the first investigation of one of the suspended employees, a counter intelligence operation, was commenced in October 2006 in reaction to information received at DISS. This information was also the reason for suspending the employee concerned and for doing a renewed security screening. The first counter intelligence operation produced information which led to a suspicion that the two suspended employees intended to make pension provisions for themselves by improperly using their positions and the financial resources at their disposal by virtue of their positions. Eventually, after further investigation, this suspicion was the reason for suspending both

⁷ *Parliamentary Papers II 2009/10, 29 924, no. 59 (appendix).*

employees and conducting a new security screening in May 2007. In August 2008 the new security screening resulted in the withdrawal of the security clearances (Dutch abbreviation: "VGB") of the persons concerned. In the period following the new security screening DISS exercised special powers in reaction to new information. These special powers were used in the context of four counter intelligence operations in the period October 2008 - March 2010.

In regard to the two new security screenings of the suspended employees the Committee has established that DISS had sufficient cause to do these screenings. In the opinion of the Committee the first new security screening of one of the suspended employees which took place at the end of 2006 should have been a more targeted and in-depth screening. At that moment, moreover, DISS should not have decided to maintain the VGB of the person concerned, because of the serious evidence available to DISS to doubt his reliability and integrity. The second new security screening, starting in May 2007 and targeting both suspended employees, was conducted within the parameters of current legislation and regulations. It is the opinion of the Committee that sufficient facts and circumstances emerged during the new security screening to justify the withdrawal of the VGBs of the persons concerned. This opinion of the Committee differs from earlier opinions of the Borghouts Committee⁸ and the complaints advisory committee for Defence. The Committee emphasizes that all committees based their opinions on the same facts, but weighed these facts differently. In the opinion of the Committee there is, moreover, an inconsistency in the report of the Borghouts committee which affects the final assessment of this committee.

With regard to the counter intelligence operations carried out by DISS it is the opinion of the Committee that in a number of cases DISS kept the link with its legal tasks insufficiently in mind when determining the object of the investigation and conducting the investigation. As a result it is the opinion of the Committee that the special powers exercised by DISS in two operations that were carried out in the period 2008-2010, that is to say in the period after the security clearances of the two suspended employees were withdrawn, were exercised unlawfully. In addition, the Committee holds the opinion that in a number of operations DISS processed information which did not serve the purpose of the operation and was not relevant in the context of the performance of its task, either. The Committee has recommended that DISS remove and destroy the information that was processed unlawfully.

With regard to the internal organisation of DISS the Committee identified a number of problem areas which were related to the regular operational activities of the service and formed one of the factors that influenced the conduct of DISS. In particular the Committee pointed out insufficient compliance with existing procedures for control, guidance and reporting. During its investigation the Committee also identified certain matters that may

to a greater or lesser extent have influenced the choices made by DISS. In this context the Committee established among other things that only limited supervision was exercised over the conducted investigations as a whole and that there was a lack of proper reporting and documentation in many cases.

In his reaction to the report the (then) minister of Defence endorsed the conclusions and recommendations of the Committee.⁹

The Standing Parliamentary Committee on Defence then sent a large number of written questions to both the minister of Defence and the Committee.¹⁰ Some of these required the Committee to divulge more about some passages it had deliberately kept abstract in order to protect sources and working methods of DISS. In these cases the Committee replied that nothing could be added to what it had already said in the report. On 4 November 2010, moreover, the Standing Parliamentary Committee on Defence asked the minister's permission to confidentially inspect the report of the aforementioned Borghouts Committee, which the minister refused - in keeping with an earlier decision of his predecessor on the same request. On 6 December 2010 the minister of Defence and the Committee sent the answers to the questions to the Standing Parliamentary Committee on Defence.¹¹ The latter committee informed the senders that it had taken note of the answers. The matter again came up for discussion, though, at a consultative meeting of the Committee and the Standing Parliamentary Committee on Defence on 12 January 2011.

The media devoted considerable attention to this affair, and also to the specific persons concerned. This was reason for the Committee in this case to provide more information in the public report about the investigation methods of DISS than is usual. In affairs like this one, in which there is a closed case and which caused great commotion, the Committee considers it important to give as much clarity as possible about what really happened and how events should be judged. This does not change the fact that there are certain aspects of the investigations about which no further information may be disclosed because of the necessity to protect sources and working methods. This is inherent to the work of an intelligence and security service, and consequently to the work of a body exercising oversight over such a service. These aspects are however described in full in the secret part of the review report provided to the parliamentary ISS Committee.

⁹ *Parliamentary Papers II 2009/10*, 29 924, no. 59.

¹⁰ *The Committee received 251 questions.*

¹¹ *Parliamentary Papers II 2010/11*, 29 924, nos. 61 and 62.

Chapter 3

The performance by GISS of its foreign intelligence task

GISS has had a foreign intelligence task since the introduction of the Intelligence and Security Services Act 2002 (ISS 2002). This task has been assigned to a separate unit within the service, the Foreign Intelligence (FI) unit. GISS has authority to use special, privacy-infringing powers when performing the foreign intelligence task. A designation order of the prime minister designates the subjects and regions which GISS is to investigate in the context of performing this task. The intelligence products of the Foreign Intelligence unit are furnished to the ministries for policy-making purposes, including in particular the ministry of Foreign Affairs.

On 10 September 2007 the Committee announced that it would conduct an investigation into the performance by GISS of its foreign intelligence task. This investigation has taken more time than usual due to other priorities. This has had the incidental benefit that the Committee was able to obtain a clear view of developments within the FI unit. In the end, the Committee investigated the lawfulness of the investigative activities undertaken by the FI unit to perform the foreign intelligence task in the period January 2006 - July 2010. In view of the scope of the activities of the FI unit it was impossible for the Committee to conduct an in-depth investigation of all investigative activities in the period mentioned. The Committee focused its investigation primarily on obtaining an overview of the exercise of special powers by the FI unit. When there was reason to do so, the Committee subjected operations to a more detailed investigation. In this context the Committee also paid attention to policy-related and organisational developments within and around the FI unit.

The Committee has established that special powers are exercised not only in the Netherlands but also abroad, which is at odds with the sovereignty of other countries. It is the opinion of the Committee that this is only acceptable if the ISS Act 2002 is applied by analogy to every action of GISS abroad.

Furthermore, the Committee has concluded that coordination between GISS and the ministry of Foreign Affairs is necessary for the proper performance of the foreign intelligence task. The Committee has established that such coordination is taking place to an increasing degree. The working relationship between GISS and DISS as regards the performance of the foreign intelligence task also improved during the investigation period,

although it was never entirely tension-free. The Committee underlined the importance of existing cooperative relations and of close contacts between the teams of GISS and DISS which are working on the same matters independently of each other. The difference of opinion between GISS and DISS about the working procedure of the National Sigint Organisation calls for a close involvement of the coordinator for the intelligence and security services aimed at solving these problems, so the Committee writes in the report.

The professionalism of the FI unit has increased in the investigation period. The Committee did not find any evidence of the unit having investigated subjects and regions that fall outside the scope of the designation order. The reasons stated for the exercise of special powers in performing the foreign intelligence task demonstrate that the FI unit's actions are well-considered. In some cases, however, the Committee discovered cases of negligence and unlawfulness. These were specific cases involving flaws in the grounds stated for the use of special powers, negligent conduct of operational employees abroad and insufficient involvement of superiors, lack of financial checks, absence of permission for the deployment of two agents and failure to fulfil the duty to ensure an agent's security.

The Committee stated that it considered it highly important that the services use their knowledge and experience of the foreign intelligence task to work on improving the preparation for operational activities abroad and on a more systematic and timely evaluation of these operations. It is necessary, for example, to provide adequate guidance to operational employees who maintain contacts with informers and agents abroad. The Committee considers it essential that the home base keeps an eye on the operations abroad and the operational employees, so that any operational problems are identified at an early stage and any necessary adjustment can be made. Prior to deploying an agent to a possibly high-risk region, moreover, a risk analysis should be prepared. This analysis must take account of the personality of the agent in relation to his assignment, his motivation and his reliability. GISS should also consider the specific risks entailed by the circumstances in the relevant region for the agent, based on objective information.

The Committee pointed out that the FI unit, having long given little attention to the documentation for the agent files, is now making efforts to exercise greater care. In the opinion of the Committee, preparing an operational plan for each agent operation can be helpful. Finally, the intelligence products which GISS provides within the context of the foreign intelligence task should state either the source or the degree of reliability of the information in order to enhance their usefulness to receivers. The Committee established that GISS did not always do this and urged the service to adjust its procedure.

On 23 February 2011 the Committee adopted the report and sent it to the minister of the Interior and Kingdom relations. The report together with the minister's reaction had not

yet been sent to the Second Chamber at the time of closing this annual report, but this will be the case by the time the annual report is published. The Committee, bearing in mind current interest, has decided to include the report as an appendix to this annual report.¹²

¹² Pursuant to article 79, ISS Act 2002, the Committee gives the Minister of the Interior and Kingdom Relations the opportunity to respond to the findings contained in the report before the Committee adopts the report. In his reaction to the report on the performance by GISS of the foreign intelligence task the minister requested the Committee to delete or rewrite certain passages since the minister thought they were not suitable for publication. The Committee has partly complied with this request. In the end the minister decided to delete two passages. These passages do not form part of the conclusions and recommendations of the report. They have been blackened in the appendix.

Chapter 4

The obligation to notify: an ongoing discussion

The obligation to notify (article 34, ISS Act 2002) means that five years after a special power has been exercised GISS and DISS must examine whether a report of the exercise of the special power can be submitted to the person with regard to whom the power was exercised. The purpose of the obligation to notify is to (better) enable individuals to effectuate their fundamental rights. The obligation to notify may lapse, be suspended or be cancelled. This may happen, for example, if the persons concerned cannot be traced, or the investigation is still ongoing or if notification might endanger sources.

On 6 April 2010 the Committee's report on the performance by GISS of the obligation to notify was published.¹³ In the report the Committee established among other things that no persons had been notified so far, while in general GISS had performed the obligation to notify in accordance with the statutory requirements. This caused the Committee to question the added value of the current notification arrangement; a question which it is not the responsibility of the Committee to answer but that of the legislature. In this context the Committee suggested to bear in mind that it is not possible to explicitly infer an active obligation to notify from the European Convention for the Protection of Human Rights (ECHR) and the relevant case law of the European Court (ECtHR) on this issue, that other safeguards exist and that the performance of the obligation takes up a considerable part of the capacity of GISS.

In his reaction to the report the minister of the Interior and Kingdom Relations, Hirsch Ballin, stated that the Committee's findings confirmed the picture he had of the benefit and the necessity of the obligation to notify.¹⁴ The minister said that the notification examinations were no sinecure and moreover a labour-intensive procedure. Assessing whether it is certain that submitting a notification report will not lead to the disclosure of a source, for example, is often a complex and extremely time-consuming job. The same is true of establishing whether an investigation is still ongoing or whether there are cross-connections between investigations, so the minister said. The minister also argued, following the Committee on this point, that the obligation to notify strongly resembles the arrangement for applying for inspection of files, and that legal safeguards might perhaps

¹³ *Parliamentary Papers II 2009/10, 29 924, no. 49 (appendix).*

¹⁴ *Parliamentary Papers II 2009/10, 29 924, no. 49, pp. 2-3.*

be provided in this way. The minister stated his intention to explore the possibilities of deleting or partly deleting the current 'active' obligation to notify in the ISS Act 2001. In this context he announced that he would also have examined how the file inspection policy could be changed to widen the possibilities for inspecting files, in which context the added value of the obligation to notify for the Dutch system of legal protection would be included in the considerations as well.

Member of Parliament Van Raak (SP) raised the minister's letter as an item for discussion at question time on 13 April 2010.¹⁵ Mr. Van Raak said that GISS had failed because so far no person had been notified and that the service should not be 'rewarded' for this by abolishing the obligation to notify. He drew attention to the fact that in 43% of the cases GISS was unable to trace the person to be notified, as stated in the Committee's report. Members of the Green Left Party and the Labour Party also took a critical position in regard to what the minister had said in the letter. The state secretary of the Interior and Kingdom Relation, Bijleveld, who appeared in Parliament on behalf of the minister of the Interior and Kingdom Relations, said that she had concluded from the report that the current provisions did not serve the purpose for which they had been introduced. She said that the minister would like to discuss the matter with the Second Chamber during a General Consultation.

On 15 September 2010 there was a General Consultation to discuss, among other things, the Committee's report.¹⁶ All Members of Parliament who were present expressed their amazement at the fact that in many cases an intelligence and security service like GISS was unable to find the persons concerned. They also expressed the opinion that a wider file inspection policy could not serve in lieu of the obligation to notify, since it was precisely the active element of the obligation, namely that GISS must take the initiative to inform an individual, that entailed an added value. The minister replied that he would leave it to the new cabinet to consider whether it would be useful to come up with a proposal for new regulations, which would require changing the law. The minister said there was an alternative, namely granting applications for inspection of files more actively and more generously, and that this would not require waiting for further decision-making by the legislature. In response to an application for inspection of files, GISS would provide the information which it would otherwise provide in the context of notification, so the minister said. He also confirmed that GISS would be more active in tracing the persons to be notified.

After the General Consultation the Committee consulted with the Standing Parliamentary

¹⁵ *Proceedings II 2009/10*, 75, pp. 6380-6382.

¹⁶ *Parliamentary Papers II 2010/11*, 30 977, no. 36.

Committee on the Interior and Kingdom Relations. Notification was again discussed at this consultation, too. The Committee was asked among other things why GISS was unable to find certain persons. The Committee pointed out that these are persons who have not been subject to any investigative acts for five or more years and that they are for the most part persons who move about a lot and who prefer not to disclose their current place of abode. Since GISS has no authority to use special powers to trace persons for notification purposes, the service has limited possibilities of finding them.

Immediately after the report was published in April 2010, however, the Committee resumed its monitoring of the performance by GISS and DISS of the obligation to notify. By now the Committee has already corresponded with the management of GISS about a number of aspects of its notification policy. This correspondence has a constructive nature.

The Committee will continue to closely monitor the notification policy and performance of the obligation to notify.

Chapter 5

Recommendations and their follow-up

It is not the responsibility of the Committee to issue binding decisions with respect to its findings. This is reserved for the ministers concerned and the heads of the services. The Committee can, however, make recommendations. In this context, closely monitoring the recommendations that have been adopted by the ministers concerned is essential.

Investigating the implementation of earlier recommendations

In the reporting year the Committee intensively investigated the follow-up of the recommendations in its reports 11 through 20, which were published in the years 2007 through 2009. Some important issues investigated are listed below:

- Are administrative checks in the context of security screenings by the police (conducted under a mandate from GISS) now being properly defined and executed?
- What progress have GISS and DISS made in their cooperation in the field of security screenings?
- Will a statutory basis for the CounterTerrorism (CT) Infobox be provided, and if so, in what way?¹⁷
- Are persons included in and/or removed from the box in a legitimate and responsible manner?
- What progress has been made in controlling and coordinating the Regional Intelligence Services?
- Have some procedural improvements been implemented regarding the use of special powers?

The Committee expects it will be able to adopt the review reports on the two services in the near future, after which they will be ready for publication.

Recent recommendations

After the publication of report no. 20 another six reports were issued. These, too, include quite a few recommendations. There has been no in-depth investigation yet of the action

¹⁷ The CT Infobox is a cooperative group comprising different services, which falls under the ISS Act 2002 and in which information is brought together for the purposes of combating terrorism and/or radicalisation.

taken in response to these recommendations. The Committee is, however, well-informed of progress in this area because of its monitoring activities and the intensive contacts it maintains with the services.

In its report on the security screening of the former chief of the Zeeland Police Force the Committee stated that it endorsed the importance of publishing guidelines on 'personal conduct' (GISS was already planning to do this at the time), since this would mean a step towards greater transparency and foreseeability. The Committee therefore greeted the publication of the Guidelines in October 2009 with approval. In the same report the Committee further recommended that GISS comply with the guideline that it must explain to informers in a security screening what is the nature and purpose of the interview with them, and must carefully state compelling reasons substantiating any decision to deviate from this rule.

In the report on the cooperation of GISS with foreign services the Committee recommended among other things - briefly stated - that the decision whether GISS can enter into or intensify cooperative relations with a foreign service be taken on the basis of a more structured and more fundamental assessment at service management level. It also recommended that the steering role of the central Foreign Relations department be better set out and its implementation ensured in practice. Some unlawful acts it had identified, moreover, gave the Committee cause to recommend that GISS would be ordered to exercise greater care when providing personal data to foreign services and to act in accordance with all the applicable statutory provisions as well as its own internal rules. In this context GISS should also lay down in writing the assessments it made. It is the Committee's opinion that the same should apply to requests to foreign services for support by exercising special powers. In addition, the Committee made some recommendations in the report in the field of cooperation with foreign services in security screenings. The minister of the Interior and Kingdom Relations adopted the recommendations of the Committee, albeit with some comments. After the report was issued, GISS started taking action in response to the aforementioned recommendations of the Committee.

In the report on the conduct of DISS with respect to a former agent the Committee found that at a certain point DISS abandoned this agent too easily and that the relationship was in this sense not phased out with sufficient care. The Committee recommended that the minister of Defence offer appropriate compensation after all. In his reply the minister announced that he would approach the former agent and offer him a sum of money. This has meanwhile been done.

In the report on the performance by GISS of the obligation to notify (see also section 4 above) the Committee recommended that GISS adjust its tracing policy thus that it also

makes use of inter alia the Regional Intelligence Services. The Committee also recommended that for the purposes of its notification postponement policy GISS link up with concrete investigations instead of phenomena in society. Finally, the Committee recommended reconsideration of some notification decisions it had found to be incorrect. In his reaction to the report the minister of the Interior and Kingdom Relations stated that he would adopt the recommendations. The Committee has found that the recommendations of its report have not yet been incorporated in the operational instructions to GISS. In practice, though, the Regional Intelligence Services are by now being used for tracing persons, in conformity with the Committee's recommendation. All but one of the notification decisions which the Committee had found incorrect have been reconsidered. The reconsiderations did not lead to notification, since the service decided to postpone or cancel notification on other grounds.

The report on the conduct of DISS with respect to two suspended employees (see also section 2 above) likewise contains some recommendations. Their essence is, briefly stated, that it would be better for DISS to henceforth put down in writing the reasons for requests for subscribers' details and telephone records (articles 28 and 29 ISS Act 2002), to put down in writing arrangements with GISS about the use of wiretapping, to establish a firmer link between the reasons for the use of special powers and the statutory tasks of DISS while also paying greater attention to the distinction between targets and non-targets, not to skip the existing control mechanisms when taking operational decisions and to produce better documentation of investigations. In his reaction the minister of Defence stated that he would adopt the recommendations. The director of DISS recently informed the Committee that a number of the recommendations had already been implemented. It was agreed that DISS will actively inform the Committee about progress in this area.

Finally, the Committee also made recommendations in the report on the performance of the foreign intelligence task by GISS, which was issued quite recently (see also section 3 above). The Committee recommended, for example, that GISS, when making use of special powers, give a better description of the potential harm to national security. It also urged GISS not to start operations in a region that may pose great risk to its agent until after it has thoroughly analyzed the risks for the agent. In addition the Committee recommended that GISS, when providing information to external parties, include an indication of its source or its reliability on a more systematic basis than was current practice. At the moment of closing the reporting year the reaction of the minister of the Interior and Kingdom Relations to the recommendations in this report had not been made known yet.

In conclusion

As was stated above, reports on (earlier) recommendations of the Committee will be issued in the near future. The Committee regrets that the current system of following up its recommendations means that many years may pass between a recommendation and a check on its implementation. At the moment the Committee is thinking about a method for keeping a more effective finger on the pulse. It will return to the subject in the next annual report

Chapter 6

International contacts

For several reasons, including the very specific nature of its activities, the Committee considers it important to maintain contacts with similar authorities abroad.

On 30 September and on 1 October 2010 the sixth Conference of the parliamentary committees for the oversight of intelligence and security services of the European Union member states was held in Brussels. Although the Committee is not itself a parliamentary oversight committee, it had been invited by the Belgian senate. On request, the chairman of the Committee gave a speech on the oversight of international cooperation between intelligence and security services. In his speech he considered the specific experiences of the Committee against the backdrop of the report it had issued on the subject in 2009. Appreciation was expressed on all sides for the Committee's advanced work on this sensitive subject.

At the request of the Swiss Centre for the Democratic Control of the Armed Forces (DCAF), the secretary of the Committee gave a workshop in Beirut for members of the Iraq parliament and the National Security Council on the democratic embedding and oversight of intelligence and security services in the reporting year. Furthermore, the Committee's staff organised a consultation between the Belgian, Norwegian, Swedish and Dutch oversight bodies in March 2011, for the purpose of achieving an exchange of working procedures.

The Committee was also asked to contribute to a study by DCAF and the European University Institute (EUI) of the parliamentary oversight of civil intelligence and security services in relevant EU Member States and other democracies, intended for use by the European Parliament Directorate-General Internal Policies of the Union - Directorate C - Citizens Rights and Constitutional Affairs. For this purpose the Committee's secretary prepared a paper on the Dutch oversight system while the chairman will take a seat on a steering group. As part of a separate DCAF project, likewise concerning the oversight of intelligence and security services, the chairman and the secretary hold seats on an Advisory Board.

The structure of the Dutch oversight system and the reports issued by the Committee are attracting attention abroad.

APPENDIX 1

The Committee (background)

Statutory tasks

The Review Committee on the Intelligence and Security Services commenced its duties on 1 July 2003. The Committee was established pursuant to the Intelligence and Security Services Act 2002 (hereinafter referred to as: the ISS Act 2002), which became effective on 29 May 2002.¹⁸ Article 1 of the Act defines the term ‘services’ to comprise the General Intelligence and Security Service (GISS) and the Military Intelligence and Security Services (DISS), which fall under the political responsibility of the minister of the Interior and Kingdom Relations and the minister of Defence, respectively. In addition, the oversight task of the Committee covers the coordinator for the intelligence and security services, who is accountable to the minister of General Affairs (see Art. 4 of the ISS Act 2002).

The statutory tasks of the Committee also include oversight of officers of the police force, the Royal Netherlands Military Constabulary and the Tax and Customs Administration, insofar as they perform activities for GISS (see Art. 60 of the ISS Act 2002).

Title 6 of the ISS Act 2002 (Articles 64-84) sets out the composition, task performance and powers as well as other matters pertaining to the Committee. In addition, it refers to other provisions of the Act that pertain to the Committee’s tasks and powers, in particular Article 34(2) and Article 55(3).

By virtue of Article 64(2) of the ISS Act 2002 the Committee is charged with:

- a. oversight of whether the provisions laid down in or pursuant to the ISS Act 2002 and the Security Screening Act¹⁹ are implemented lawfully;
- b. informing and advising the ministers concerned on the findings of the Committee (both on request and on its own initiative);
- c. advising the ministers concerned on the investigation and assessment of complaints;
- d. advising the ministers concerned on the obligation to notify, which is embodied in Article 34 of the Act and which entered into effect five years after the ISS Act 2002 entered into effect - from 29 May 2007, therefore.

¹⁸ See *Bulletin of Acts and Decrees (Stb.) 2002, 148 (most recently amended by Act of 2 November 2006, Stb. 574)*.

¹⁹ *Bulletin of Acts and Decrees (Stb.) 2002, 525 (most recently amended by Act of 11 October 2007, Stb. 2007, 508)*

Of the above tasks the one mentioned under a, that of the oversight of the lawfulness of the activities of the services, is in practice by far the most important task for the Committee. In the context of its lawfulness reviews the Committee, for example, closely scrutinizes the exercise of special powers by the services. These are powers which infringe or may infringe human rights that are recognised by the Netherlands, in particular the right to protection of privacy, and may therefore only be exercised subject to strict conditions.

For example: under the ISS Act 2002 (see Articles 20-30 of the Act) the services may only exercise special powers or use special intelligence means if this is necessary for the proper performance by the services of the tasks assigned to them (Article 18 of the Act). In addition, these special powers or intelligence means may only be exercised or used taking due account of the requirements of proportionality and subsidiarity (Articles 31 and 32 of the Act), that is to say that the exercise or use of the powers or intelligence means must be reasonably proportionate to the purpose for which they are exercised or used, while it is not possible to exercise powers or use intelligence means that are less drastic and less intrusive of an individual's privacy, for example the use of public sources. In each of its investigations the Committee carefully assesses (among other things) whether these three requirements have been met.

When investigating the lawfulness of the activities of the services the Committee sometimes comes across operational expediency issues. In the context of the task defined under b. (informing and advising the ministers about its findings) the Committee will inform the ministers concerned of these findings as well. This is in line with the position taken by the government when the bill was debated in parliament, and with the wish expressed by the ministers concerned to the Committee.

Article 80 of the ISS Act 2002 provides that before 1 May of each year the Committee must issue a (public) report on its activities. The report is submitted to both Chambers of the States General and the ministers concerned: the prime minister acting in his capacity as minister of General Affairs, the minister of the Interior and Kingdom Relations, and the minister of Defence. In order to make the report as up-to-date as possible, the Committee has provided in Article 10 of its Rules of Procedure that the reporting period runs from 1 April of the previous calendar year until 1 April of the current year.

In accordance with paragraphs (3) and (4) of Article 8 of the ISS Act 2002, which pursuant to Article 80 apply to the annual reports of the Committee as well, these public reports do not mention any data giving an insight into the means the services have used in concrete cases, into secret sources or into the current level of information of the services, but the minister concerned may confidentially disclose such data to the States General. So far, all annual reports of the Committee, including the present one, have been fully public; there

are no secret appendices. The annual reports are also published on the website of the Committee: www.ctivd.nl

Members and employees of the Committee can only be appointed after they have successfully passed a category A security screening.

The Committee is entirely independent, also financially. It has its own budget, adopted by the same law by which the budgets of the ministry of General Affairs and of the Queen's Office are adopted.

Investigations

The Committee is free to choose the subjects of its investigations. Either Chamber of the States General may request the Committee to conduct a specific investigation (Art. 78(2) of the ISS Act 2002). In the past years the Second Chamber made several such requests, through the minister of the Interior and Kingdom Relations. The Committee strives to comply with such requests, and to do so as soon as possible. The Committee attaches great importance to giving the best possible support to the review task of the two Chambers of the States General by means of its investigative activities and reports.

Once the Committee has decided to conduct a specific investigation (on its own initiative or at the request of one of the ministers concerned or one of the Chambers of the States General), the ministers concerned and the presidents of the two Chambers are informed of this intention.

In the course of an investigation the Committee examines files, hears individuals and studies the applicable legislation and regulations, both national and international. The legislator has granted the Committee far-reaching powers for these purposes.

By virtue of Article 73 of the ISS Act 2002, for example, the Committee has direct access to all data processed in the context of the implementation of this Act and the Security Screening Act. So it has access not only to data contained in documents issued or authorised by the management of the services, but also to any and all documents found present at one of the services which the Committee finds it necessary to inspect for the purposes of an investigation it is conducting and related investigative subjects.

Furthermore, any person involved in the implementation of these two Acts, first of all the employees of the services therefore, are required, if so requested, to furnish such information and render such assistance to the Committee as it requires for the proper performance of its task. The only reservation made with respect to this twofold power is

that if there is reason to do so, the services may state which data may, in the interest of national security, not be disclosed beyond the Committee.

For the purposes of its review task the Committee may summon persons to appear before the Committee as witnesses. Witnesses so summoned are required by law to appear and to provide the Committee with all such information as the Committee considers necessary, obviously insofar as they have knowledge of the information. If a person refuses to comply with the summons to appear before the Committee, the Committee may issue a warrant to secure this person's presence. The Committee may also hear witnesses on oath or after they have made a solemn affirmation. These far-reaching powers are described in Articles 74 and 75 of the ISS Act 2002.

A review report contains the findings, conclusions and recommendations of the Committee in a specific investigation. These can be useful to the services and the ministers responsible for the services and to the Chambers of the States General in performing their respective tasks.

The Committee regularly consults with the prime minister acting in his capacity as minister of General Affairs, the minister of the Interior and Kingdom Relations, and the minister of Defence.

It also holds regular consultations with the three committees of the Second Chamber that are specifically concerned with the functioning of the intelligence and security services: the Committee on the Intelligence and Security Services, the Standing Parliamentary Committee on Home Affairs and Kingdom Relations and the Standing Parliamentary Committee on Defence. In addition, the Committee has consultative meetings with the Standing Parliamentary Committee of the First Chamber on Home Affairs and Kingdom Relations / General Affairs and on Foreign Affairs, Defence and Development Assistance, respectively.

At these consultative meetings there is an intensive exchange of views on the Committee's findings and recommendations as stated in its reports.

Naturally, the Committee has frequent contacts with the management and employees of the two services.

The parliamentary history of the ISS Act 2002 shows that the legislator took the position that it was not advisable to let the Committee send the review reports it has produced directly to the two Chambers of the States General, because the minister had to be able to assess publication of the information presented in the reports against state interests and the interests of national security. For this reason the reports are sent to the States General through the intermediary of the minister concerned, who then adds his or her comments on the report.

Because of this procedure the relevant minister is given two opportunities to respond to a report from the Committee before it reaches the States General. The first time is after the Committee has prepared its report. The minister then has the opportunity to respond to the report and the findings and recommendations it contains within a reasonable period set by the Committee. Subsequently, the Committee adopts the report, whether or not in amended form, and sends it to the Minister for the second time, who must then send it to both Chambers of the States General, together with his or her response, within a (statutory) period of six weeks.

Complaints handling

Any person who wishes to submit a complaint about conduct of the services²⁰ must first – before filing his complaint with the National Ombudsman – apply to the minister responsible for the service concerned. The Committee plays an advisory role in the minister’s handling of such complaints. Before giving a decision whether or not the complaint is well-founded, so Article 83(3) of the ISS Act 2002 provides, the minister must obtain the advisory opinion of the Committee. In this way the Committee acts as a mandatory external advisory body. Division 9.1.3 of the General Administrative Law Act (further referred to as “GALA”) is applicable with respect to the advisory role of the Committee. However, in derogation of Article 9:14(2) GALA, the minister concerned may not give the Committee any instructions. This provision has been included in connection with the independence of the Committee.

Involving the Committee as a complaints advisory committee means that the Committee takes over the entire investigation into the conduct challenged by the complaint and the procedures to be followed in connection with the complaint, including hearing the complainant and employees of the service involved. On the basis of the documents and its hearing of the complainant, the Committee itself determines the substance and scope of the complaint on which it will give an advisory opinion.

Immediately after receiving a complaint on which it is to give an advisory opinion, the Committee examines any files that are present at the intelligence and security service concerned.

²⁰ Art. 83(1) of the ISS Act 2002 provides that complaints can be filed about conduct or alleged conduct of the ministers concerned (Interior and Kingdom relations, Defence, and General Affairs), the heads of the services (GISS and DISS), the coordinator, and persons working for the services and the coordinator.

If the complaint is manifestly ill-founded, however, the Committee may decide not to examine the files. Next, the Committee proceeds to hear the complainant unless it decides not to do so because the complaint is manifestly ill-founded or the complainant has stated that he or she will not exercise the right to be heard (Article 9:15(3) GALA). As a rule the conduct of the hearing is not undertaken by the full Committee but entrusted by it to the chairman or a member of the Committee. In addition to the complainant, the person to whose conduct the complaint relates is given the opportunity to present his or her view regarding the complaint. The Committee may allow the parties to reply and rejoin. The Committee may decide to hear witnesses if this is necessary to make a full investigation.

After examining the files and hearing the persons concerned, the Committee assesses whether the conduct of the challenged service meets the standards of proper conduct. For this task the Committee has a broader assessment framework than for its review task, since the latter is restricted to review as to lawfulness.²¹ Subsequently, the Committee sends a report of its findings accompanied by an advisory opinion and possibly by recommendations to the minister concerned (Article 9:15 GALA). The minister may depart from the Committee's advisory opinion, but in that case the minister must state the reason for departing from the advisory opinion in his or her reply to the complainant, and also must send the Committee's advisory opinion to the complainant.

In formulating its advisory opinion the Committee must therefore bear in mind that the advisory opinion may be made public. This will inevitably result in the Committee sometimes using vague and abstract wordings in its advisory opinion.

Before asking the Committee to give an advisory opinion on the merits of a complaint, the minister will first give the service concerned the opportunity to dispose of the complaint informally. This is in keeping with the view taken by the legislator that unnecessary formal and bureaucratic procedures are to be avoided.²² The Committee likewise holds the opinion that the services must first be given an opportunity to dispose of complaints informally themselves, unless there are indications that this will be in vain.

In its capacity as complaints advisory committee the Committee does not have an advisory task within the meaning of Article 83 of the ISS Act 2002 until the minister has received a formal complaint. However, the minister is not required to call in the Committee for all formal complaints. The minister is not required to obtain the advisory opinion of the Committee if a complaint is inadmissible pursuant to Article 9:4 GALA or if it is not taken up pursuant to the provisions of Article 9:8 GALA. The requirement to call in the

²¹ *But lawfulness forms part of the standards of proper conduct applied as a criterion in handling complaints. Parliamentary papers II 1997-1998, 25 837, B, p. 6.*

²² *Parliamentary papers II 1997/98, 25 837, no. 3, p. 7.*

Committee only applies if the assessment whether a complaint is well-founded calls for a substantive assessment. In other words: the minister is not required to obtain the advisory opinion of the Committee if he refrains from giving a decision on the conduct. Manifestly ill-founded complaints, on the contrary, are not excluded from the minister's obligation to consider all complaints.²³ In principle the Committee must give an advisory opinion on such complaints as well. In these cases, however (and also if the complainant has stated that he does not wish to exercise the right to be heard), Article 9:10 GALA releases the Committee from the obligation to hear the complainant.²⁴

²³ *Contrary to the National Ombudsman (see. Art. 9:23, first sentence and under b, GALA) the rules of the General Administrative Law Act apparently require the minister to consider manifestly ill-founded complaints.*

²⁴ *Parliamentary papers II 1997/98, 25 837, B, p. 4.*

APPENDIX 2

List of review reports

Review report on the investigation by DISS into incidents that may harm Defence (*Toezichtsrapport inzake het onderzoek van de MIVD naar voorvallen die Defensie kunnen schaden*) (CTIVD no. 1, 2004)

Review report on the investigation by GISS into radicalisation processes within the Islamic community (*Toezichtsrapport inzake het AIVD-onderzoek naar radicaliseringsprocessen binnen de islamitische gemeenschap*) (CTIVD no. 2, 2004)

Review report on a counter-terrorism operation by DISS (*Toezichtsrapport inzake een contra-terrorisme operatie door de MIVD*) (CTIVD no. 3, 2004)

Review report on the investigation by GISS of developments within the Moluccan community in the Netherlands (*Toezichtsrapport inzake het AIVD-onderzoek naar de ontwikkelingen binnen de Molukse gemeenschap in Nederland*) (CTIVD no. 4, 2005)

Review report on the investigation by DISS into the proliferation of weapons of mass destruction and their means of delivery* (*Toezichtsrapport inzake het MIVD-onderzoek naar proliferatie van massavernietigingswapens en overbrengingsmiddelen*) (CTIVD no. 5a, 2005)

Review report on the investigation by GISS into the proliferation of weapons of mass destruction and means of delivery* (*Toezichtsrapport inzake het AIVD-onderzoek naar proliferatie van massavernietigingswapens en overbrengingsmiddelen*) (CTIVD no. 5b, 2005)

Review report on the investigation by GISS into radical animal rights activism and left-wing extremism* (*Toezichtsrapport inzake het AIVD-onderzoek naar radicaal dierenrechtenactivisme en links-extremisme*) (CTIVD no. 6, 2006)

Review report on the performance of a counter-terrorism operation by GISS (*Toezichtsrapport inzake de uitvoering van een contra-terrorisme operatie van de AIVD*) (CTIVD no. 7, 2006)

Review report on the deployment by DISS of informers and agents, more in particular abroad* (*Toezichtsrapport inzake de inzet door de MIVD van informanten en agenten, meer in het bijzonder in het buitenland*) (CTIVD no. 8a, 2006)

Review report on the deployment by GISS of informers and agents, more in particular

abroad* (*Toezihtsrapport inzake de inzet door de AIVD van informanten en agenten, meer in het bijzonder in het buitenland*) (CTIVD no. 8b, 2006)

Review report on the official messages issued by GISS in the period from January 2004 - October 2005* (*Toezihtsrapport inzake de door de AIVD uitgebrachte ambtsberichten in de periode van januari 2004 tot oktober 2005*) (CTIVD no. 9a, 2006)

Review report on the official messages issued by DISS in the period from January 2004 - January 2006* (*Toezihtsrapport inzake de door de MIVD uitgebrachte ambtsberichten in de periode van januari 2004 tot januari 2006*) (CTIVD no. 9b, 2006)

Review report on the investigation by GISS into the leaking of state secrets* (*Toezihtsrapport inzake het onderzoek van de AIVD naar het uitlekken van staatsgeheimen*) (CTIVD no. 10, 2006)

Review report on the implementation of the Security Screening Act by DISS (*Toezihtsrapport inzake de uitvoering van de Wet veiligheidsonderzoeken door de MIVD*) (CTIVD no. 11a, 2007)

Review report on the implementation of the Security Screening Act by GISS (*Toezihtsrapport inzake de uitvoering van de Wet veiligheidsonderzoeken door de AIVD*) (CTIVD no. 11b, 2007)

Review report on the Counter-Terrorism Infobox (*Toezihtsrapport inzake de Contra Terrorisme Infobox*) (CTIVD no. 12, 2007)

Review report on the exchange of information between GISS and the Immigration and Naturalisation Service (*Toezihtsrapport inzake de uitwisseling van gegevens tussen de AIVD en de IND*) (CTIVD no. 13, 2007)

Review report on the investigation by GISS into unwanted interference by foreign powers (including espionage) (*Toezihtsrapport inzake het onderzoek van de AIVD naar de ongewenste inmenging van vreemde mogendheden (waaronder spionage)*) (CTIVD no. 14, 2007)

Review report on the conduct of employees of DISS in Iraq when questioning detainees (*Toezihtsrapport inzake het optreden van MIVD-medewerkers in Irak bij het ondervragen van gedetineerden*) (CTIVD no. 15, 2007)

Review report on the cooperation between GISS and the Regional Intelligence Services and the Royal Netherlands Military Constabulary, respectively (*Toezihtsrapport inzake de samenwerking tussen de AIVD en de Regionale Inlichtingendiensten resp. de Koninklijke marechaussee*) (CTIVD no. 16, 2008)

Review report on the assessment processes at GISS with respect to Mohammed B. (*Toezihtsrapport inzake de afwegingsprocessen van de AIVD met betrekking tot Mohammed B.*) (CTIVD no. 17, 2008)

Review report on the fulfilment by GISS of the commitments made by the minister of the Interior and Kingdom Relations in response to the recommendations of the Committee (*Toezihtsrapport inzake de nakoming door de AIVD van de toezeggingen van de Minister van BZK op de aanbevelingen van de Commissie*) (CTIVD no. 18A, 2008)

Review report on the fulfilment by DISS of the commitments made by the minister of Defence in response to the recommendations of the Committee (*Toezihtsrapport inzake de nakoming door de MIVD van de toezeggingen van de Minister van Defensie op de aanbevelingen van de Commissie*) (CTIVD no. 18B, 2008)

Review report on the application by GISS of Article 25 of the ISS Act 2002 (wiretapping) and Article 27 of the ISS Act 2002 (selection of non-targeted interceptions of non cable-bound telecommunications* (*Toezihtsrapport inzake de toepassing door de AIVD van art. 25 ISS Act 2002 (aftappen) en art. 27 ISS Act 2002 (selectie van ongericht ontvangen niet-kabelgebonden telecommunicatie)*) (CTIVD no. 19, 2009)

Review report on financial and economic investigations by GISS (*Toezihtsrapport inzake financieel-economische onderzoeken door de AIVD*) (CTIVD no. 20, 2009)

Review report on the security screening by GISS of the (former) chief of the Zeeland Police Force Mr F.P. Goudswaard (*Toezihtsrapport inzake het veiligheidsonderzoek van de AIVD naar de (voormalige) korpschef van de Politie Zeeland dbr. F.P. Goudswaard*) (CTIVD no. 21, 2009)

Review report on the cooperation of GISS with foreign intelligence and/or security services* (*Toezihtsrapport inzake de samenwerking van de AIVD met buitenlandse inlichtingen- en/of veiligheidsdiensten*) (CTIVD no. 22A, 2009)

Review report on the conduct of DISS with respect to a former agent (*Toezihtsrapport inzake het handelen van de MIVD jegens een voormalige agent*) (CTIVD no. 23, 2010)

Review report on the performance by GISS of the obligation to notify* (*Toezihtsrapport*

inzake de uitvoering van de notificatieplicht door de AIVD) CTIVD no. 24, 2010)

Review report on the conduct of DISS with respect to two suspended employees
(Toezichtsrapport inzake het handelen van de MIVD jegens twee geschorste medewerkers)
CTIVD no. 25, 2010)

Review report on the performance by GISS of the foreign intelligence task*
(Toezichts-rapport inzake de uitvoering van de inlichtingentaak buitenland door de AIVD) (CTIVD no. 26, 2011)

* Available in English

APPENDIX 3

Review report on the performance by GISS
of the foreign intelligence task

Review Report CTIVD no. 26

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

Table of contents

Summary	47
1 Introduction	49
2 Organisation of the investigation	49
3 Theoretical framework for the foreign intelligence task	50
3.1 Statutory background of the task	50
3.2 National security	52
3.3 Vital economic interests	53
3.4 Designation order	54
3.5 Special powers in the context of the foreign intelligence task	56
3.5.1 Special powers and national security	56
3.5.2 Special powers abroad	57
4 Organisation of the foreign intelligence task	60
4.1 Designation orders	60
4.2 Foreign Intelligence Unit	62
4.3 Authorities concerned	64
4.3.1 Ministry of General Affairs	64
4.3.2 Ministry of Foreign Affairs	66
4.3.3 DISS	67
4.3.4 Foreign services	69
5 Investigation practice of the Foreign Intelligence Unit	69
5.1 Bound by its mandate	69
5.1.1 Designation order	69
5.1.2 Vital economic interests and energy supply security	70
5.2 Use of special powers, generally	72
5.3 Deployment of agents and informers	73
5.3.1 General	73

5.3.2	Operational security of informers and agents abroad	76
5.3.3	Documentation	76
5.3.4	Financial records	77
5.3.5	Termination of the deployment of informers and agents	78
5.4	Use of Sigint	78
5.5	Use of wiretapping	80
5.6	Provision of information to external parties	80
6	Conclusions and recommendations	81

Review Report CTIVD no. 26

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

SUMMARY

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

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

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

The professionalism of the FI unit has increased in the investigation period. The Committee has not found any evidence of the unit having investigated subjects and regions that fall outside the scope of the designation order. The reasons stated for the use of special powers in performing the foreign intelligence task demonstrate that the FI

unit's are well-considered. In some cases, however, the Committee discovered examples of negligence and unlawfulness. These were specific cases involving flaws in the grounds stated for the use of special powers, negligent conduct of operational employees abroad and insufficient involvement of superiors, lack of financial checks, absence of permission for the deployment of two agents and failure to fulfil the duty to ensure an agent's security.

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

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

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

Review Report CTIVD no. 26

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

1. Introduction

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

This report has a secret appendix.

2. Organisation of the investigation

The Committee's investigation was directed at the manner in which GISS performs the task described in article 6(2)(d) of the ISS Act 2002.¹ In the interest of national security GISS is charged with the following foreign intelligence task:

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

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

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

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

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

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

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

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

3. Theoretical framework for the foreign intelligence task

3.1 Statutory background of the task

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

‘This service has authority to collect and the duty to pass on to the appropriate place all intelligence from abroad that is important to the Kingdom (...).’³

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

‘Collecting information concerning foreign countries which may be important to the government’⁵

The IDB and its predecessor fell under the responsibility of the prime minister and the ministry of General Affairs.⁶ When the IDB was abolished in 1994, the National Security Service (BVD) and the Military Intelligence Service (MID), as they were called at the time, took over a number of the tasks that fitted within the existing task descriptions of these services. The strictly offensive intelligence activities, however, which were aimed at obtaining information regarding subjects not directly related to (actual) threats to national security, were not transferred.⁷ The expectation was that in the period following the end of the Cold War there would be no more need for such information, and that this task could be cancelled.

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

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

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

⁵ Bulletin of Acts and Decrees 1972, no. 437 and no. 438.

⁶ Albeit that from 1970 to 1972 the BID was placed under the ministry of Defence, see “Villa Maarheeze”, De Graaff & Wiebes, The Hague: SDU Uitgevers 1998, p. 229.

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

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

3.2 National security

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

The concept of “national security” is connected to article 8(2) of the European Convention on Human Rights (ECHR), with the result that the interpretation of the concept is determined among other things by existing and future case law on that article. The European Court of Human Rights (ECtHR) has not defined the meaning and scope of the concept¹⁰, but in various judgments it identified threats to national security. National security can be endangered, for example, by espionage¹¹, separatist movements¹², terrorism¹³ and inciting to and approving terrorism.¹⁴ When drafting the ISS Act 2002 the government held – on the basis of the case law of the ECtHR – that the state parties to the Convention have some freedom to interpret the concept of national security: “the national legislature is allowed a (wide) margin of appreciation”.¹⁵

The task description of GISS includes a provision that investigations pursuant to the security task¹⁶ may only be conducted regarding organisations and persons which/who, because of the objectives they pursue or by their activities, give cause for serious suspicion that they constitute a danger to the continued existence of the democratic legal system, or to the security or other vital interests of the state (article 6(2)(a), ISS Act 2002). The description of the foreign intelligence task of GISS (article 6(2)(d), ISS Act 2002) does not state the requirement of a threatening danger to national security. With respect to this task it is therefore sufficient for an investigation to be conducted in the interest of national security, as stated in the opening sentence of article 6, ISS Act 2002. When drafting the ISS Act 2002, the government explained this summarily by the following consideration:

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

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

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

¹¹ ECtHR 6 September 1978, case A/28 (*Klass/Germany*), no. 48.

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

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

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

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

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

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

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

3.3 Vital economic interests

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

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

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

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

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

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

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

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

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

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

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

3.4 Designation order

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

The investigation subject are laid down in a designation order which is adopted, in conformity with article 6(2)(d), ISS Act 2002, by the prime minister in consultation with the minister of Defence and the minister of the Interior and Kingdom Relations. A substantial part of the intelligence gathered by GISS in the context of the foreign intelligence task is intended for the use of the ministry of Foreign Affairs. This is not very surprising since the foreign intelligence task is aimed at supplying information, including secret information, to the government for use in international consultations, and it is the ministry of Foreign Affairs that is responsible for determining and propagating Dutch foreign policy.²⁶ There

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

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

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

is no mention in Article 6(2)(d), ISS Act 2002, however, of the minister of Foreign Affairs as one of the authors of the designation order. When the bill was discussed in the First Chamber, members of the CDA parliamentary group asked about the reason for this.²⁷ In his memorandum of reply the minister of the Interior and Kingdom Affairs explained that the three ministers concerned who are mentioned in the bill are all involved with the services' performance of their tasks in their capacity as ministers responsible for the services. The minister of Foreign Affairs does not bear responsibility for any service and consequently does not fall within this category. The minister stated that article 3 of the bill provided for the possibility of inviting other ministers to the consultations of the three ministers concerned, if necessary. Furthermore, the minister of Foreign Affairs could send a representative to the preparatory body for the ministerial consultation, i.e. the Netherlands Joint Intelligence Committee (Dutch abbreviated: CVIN).²⁸ The minister pointed out that in the days of IDB the minister of Foreign Affairs was not included in the group of ministers concerned either.²⁹ After the introduction of the ISS Act 2002 it emerged that the close involvement of the minister of Foreign Affairs with drafting the designation order was required in order to achieve an adequate statement of needs in the context of the foreign intelligence task. In practice, therefore, the designation order is prepared by the prime minister, the ministers concerned and the minister of Foreign Affairs, jointly. A proposed amendment to the ISS Act 2002, dating from 2006, is aimed at formalizing this factual situation by adding "and the Minister of Foreign Affairs" after the words "the Ministers concerned" in article 6(2)(d), ISS Act, 2002.³⁰

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

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

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

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

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

3.5 Special powers in the context of the foreign intelligence task

3.5.1 Special powers and national security

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

In its investigation of the application of articles 25 and 27 of the ISS Act 2002 the Committee explained this trend in case law and its significance for GISS. In response to the Committee's report the minister of the Interior and Kingdom Relations stated that he agreed with the Committee's analysis.³² This means with regard to the use of special powers by GISS in the context of the foreign intelligence task that it does not suffice to merely state that a subject to be investigated is mentioned in the designation order. The designation order may designate subjects which are to be investigated exclusively in the interest of national security, without necessarily involving any potential harm to national security. A mere reference to approved investigation projects also does not suffice to justify the use of special powers.

In the opinion of the Committee, special powers should only be used by GISS in the performance of its foreign intelligence task when it investigates matters which may potentially lead to harm being done to national security. Assessing how the harm will

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

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

eventually materialize is more difficult in the case of the foreign intelligence task than in the case of the security task of GISS. This is due to the fact that it is often only in the fairly long term that the international developments and political intentions investigated by GISS in the context of the foreign intelligence task will have a possible adverse effect on national security. The Committee considers it important, however, that GISS specifies the possible harm to national security when it makes use of special powers in the context of the foreign intelligence task.

3.5.2 Special powers abroad

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

When the ISS Act 2002 was debated in parliament the possibility of carrying out intelligence activities abroad was discussed. The assumption was that the Dutch services would be active abroad. A particularly important question was which law ought to apply to these intelligence activities: Dutch law or the law of the country in which the activities take place. It proved to be difficult to achieve clarity on the issue. In his written reply to questions the minister of the Interior and Kingdom Relations explained that when the Dutch services carried out intelligence activities abroad they must “naturally” respect the parameters attached to the Dutch jurisdiction.³⁴ In addition he held that agents must have authority, “subject to stringent conditions”, to commit punishable offences, just as they have in the Netherlands.³⁵ Powers which GISS and DISS do not have in the Netherlands should not be subsequently “created” abroad, so the minister stated. At a later stage, however, the minister kept open the possibility that nevertheless, if something “is very

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

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

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

important for our country”, things will be done “which I might perhaps not do in the Netherlands”.³⁶ On the other hand the minister emphasized that the limits to intelligence activities abroad are “in principle” determined by the legislation and regulations applying locally.³⁷ These remarks created confusion and they show that it is not easy to find an unequivocal answer to the question whether or not intelligence activities abroad are lawful. MP Vos (VVD) recommended that if no legally sound solution to the problem could be found, an ethical code of conduct should be drafted governing the services’ conduct abroad.³⁸ This recommendation was well received by the minister who expressed his hope of developing an ethical code of conduct in cooperation with the Standing Parliamentary Committee on the Intelligence and Security Services, saying that naturally the Review Committee could be involved in the process as well.³⁹

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

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

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

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

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

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

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

It does indeed seem difficult to find an unequivocal answer to the question whether the use of special powers abroad is lawful.⁴¹ It is clear, though, that the use of special powers abroad is at odds with the principle of sovereignty. As was explained above, the Netherlands itself considers it unacceptable if foreign intelligence services carry out secret activities on Dutch territory. Moreover, there is no formal legitimation for such activities since a national law like the ISS Act 2002 cannot unilaterally legitimize activities in the territory of another state.

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

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

⁴¹ *For the purpose of initiating an exchange of ideas on this issue between scholars, employees of intelligence and security services and other government officials the Committee organised a (closed) afternoon seminar on the theme of "intelligence activities abroad" on 18 October 2007. A concise report of this seminar is to be found on the Committee's website: www.ctivd.nl.*

⁴² *See also CTIVD review report no. 8b on the deployment by GISS of informers and agents, more in particular abroad, section 5.2, not a parliamentary paper, available at www.ctivd.nl.*

are more limited abroad. For this reason the assessment of operational security abroad requires a thorough risk analysis. This will be discussed in greater detail in sections 5.3.1 and 5.3.2 below.

4 Organisation of the foreign intelligence task

4.1 Designation order

From 2002 to 2008 a designation order was issued every year.⁴³ The Committee for the Administrative Evaluation of GISS (also called the Havermans committee) established in 2004 that the limited capacity of GISS had been insufficiently taken into account when the designation orders were prepared.⁴⁴ Until 2008 designation orders comprised a broad range of subjects and countries. The subjects to be investigated included, for example, international terrorism, proliferation of weapons of mass destruction, internationally organised crime and energy supply security. The number of regions to be investigated was likewise very comprehensive. On the occasion of the so-called “rethinking” of the FI directorate in 2007 (for details see section 4.2) it was established that an effective implementation of the foreign intelligence task would require the designation order to be considerably curtailed. It was also decided to give the designation order a longer life, in order to achieve more stability in creating and maintaining an information position regarding a specific subject and region. Investigations are currently carried out on the basis of the designation order 2008-2012 which became effective in 2008 and is subject to annual evaluation. Article 1 of the designation order 2008-2012 designates the following subjects:

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

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

⁴⁴ Committee for the Administrative Evaluation of GISS, “De AIVD in verandering”, November 2004, p.178.

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

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

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

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

In the designation order 2008-2012 an early warning quick response task was added in article 1(b) in order to give the services the opportunity to investigate developments which are not immediately perceivable, not yet known or which arise suddenly in countries other than those mentioned in the secret appendix. The authorities determining the intelligence needs, including in particular the ministry of Foreign Affairs, formulate their wishes regarding this task in a request for intelligence to the FI unit. The FI unit then examines if and how the request can be met. Given that this designation order is more limited in scope and has a longer life than the preceding designation orders, the early warning quick response task offers the possibility of responding to new developments. In addition, in view of the longer life of the current designation order, it is evaluated every year and adjusted if the evaluation gives reason to do so. Since the present designation order came into effect, a classified supplemental designation order has been included, which relates to a specific region.

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

4.2 Foreign Intelligence Unit

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

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

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

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

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

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

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

In 2004 the FI directorate also conducted a self-evaluation. It emerged, among other things, that there was a lack of balance between pretension and realistic possibilities. The designation order and the high expectations of the intelligence users took insufficient account of the limited capacity of the FI directorate. Subsequently, in 2006, the FI directorate and the performance of the foreign intelligence task were evaluated by the quality manager of GISS. The quality manager confirmed the earlier findings, but found that after the critical remarks of the Havermans Committee a positive development had set in. In response to the evaluation a plan of action was presented for “rethinking” the FI directorate in 2007, when the foreign intelligence task had been in place for five years. The plan presented the new approach to the FI directorate:

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

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

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

In organisational terms the unit is coordinate with the unit charged with the security task of GISS. This does not change the fact that GISS is by tradition a security service. As a result it has not been easy for the FI unit to develop and strengthen its own position within the service. The unit works on the basis of teams. Up to 2009 the annual assignments to teams indicated how the investigation areas mentioned in the designation order were to be

⁵⁰ For more information about the reorganisation see the annual reports 2008 and 2009 of GISS, www.jaarverslag.aivd.nl.

investigated. Since the entire service was restructured, all investigation teams of GISS work on the basis of investigation projects. In a project plan, teams of the FI Unit state precisely how the investigation into a specific element of the designation order will be organised. Investigation projects are renewed annually and subjected to semi-annual interim evaluation, after obtaining the advice of the unit responsible for supervising operations.

The FI unit's pursuit of being an offensive intelligence unit raises the question whether it can at the same time play a role in gathering rather more threat-related foreign intelligence. The issue of defensive foreign intelligence gathering came up at the press conference on the annual report of GISS for 2009. The head of GISS explained that threats to national security are increasingly coming from abroad. To an increasing extent the attention of GISS is therefore focused on developments abroad, by way of forward defence. The threats in question come from abroad and are aimed at the Netherlands or at Dutch interests abroad. It is the intention of GISS to pay more attention in all the service's activities to forward defence.⁵¹ This may also have an effect on the performance of the foreign intelligence task, among other things because these threats may come from countries that are also mentioned in the designation order. The relation between defensive and offensive activities abroad and the role of the FI unit in this matter had not yet crystallized, however, when the Committee closed its investigation.

4.3 Authorities concerned

4.3.1 Ministry of General Affairs

Article 4 of the ISS Act 2002 introduced the function of coordinator for the intelligence and security services. The coordinator is appointed by royal decree. Since the entry into force of the ISS Act 2002 the function has been assigned to the secretary-general of the ministry of General Affairs or his deputy.⁵² Pursuant to article 4(3) of the Act the coordinator's tasks consist of coordinating the tasks of the services and doing the preparatory work for consultations between the ministers concerned about their policy regarding the intelligence and security services. The coordinator does not have an independent intelligence task of his own⁵³, but the heads of the two services must provide him with all the information

⁵¹ *This emerges from the news report of 27 July 2010 on the website of GISS, www.aivd.nl, "Forward defense nader verklaard".*

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

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

necessary for the performance of his task (article 5, ISS Act 2002). In 2004 the Havermans Committee reached the following conclusion regarding the role of the coordinator:

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

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

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

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

Consultation about the intelligence and security services between the ministers concerned in the Council for National Security (RNV) is preceded by a meeting of the official Netherlands Joint Intelligence Committee (CVIN). The Netherlands Joint Intelligence Committee is chaired by the coordinator, and meetings are not only attended by the head of GISS and the director of DISS but also by the National Coordinator Counterterrorism and

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

representatives of the ministries of Foreign Affairs, the Interior and Kingdom Relations, Defence and Justice. The prime minister is informed and advised by the coordinator and he chairs the Council for National Security. In the early days of the period investigated by the Review Committee the dangers to national security were the focus of attention for both the Council for National Security and the Joint Intelligence Committee. Since 2009, when GISS and DISS started issuing the three-monthly Nationaal Inlichtingenbeeld, more attention has been devoted to the foreign intelligence task. At the time of closing of this investigation the Netherlands Joint Intelligence Committee and the Council for National Security were undergoing a restructuring process, which is to result in a body to be called the Council for Intelligence and Security (RIV).

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

4.3.2 Ministry of Foreign Affairs

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

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

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

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

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

4.3.3 DISS

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

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

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

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

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

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

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

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

the same phenomena in the same regions. The Committee underlines the importance of close contacts between the teams of GISS and DISS that are working on the same matters independently of each other.

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

4.3.4 Foreign services

Foreign services are an important source of information for investigations in the context of the intelligence task. The FI unit also frequently shares information with foreign services and there is close (operational) cooperation regarding some parts of the investigations. The Committee refers to its review report on the cooperation of GISS with foreign intelligence and/or security services for a more detailed consideration of the nature and lawfulness of the contacts with foreign intelligence services.⁵⁷

5 Investigation practices of the Foreign Intelligence unit

5.1 Bound by its mandate

5.1.1 Designation orders

The Committee has established that until 2008 designation orders were formulated so broadly that the FI directorate had to investigate more areas than it was reasonably capable of doing on the basis of its available capacity. The Committee has not found any evidence

⁵⁶ *CTIVD review report no. 5b on the lawfulness of the investigation by GISS into the proliferation of weapons of mass destruction and means of delivery, recommendation 6.1. No Parliamentary document, to be found at www.ctivd.nl.*

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

of the FI unit having investigated subjects and regions that fall outside the scope of the designation order.

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

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

5.1.2 Vital economic interests and energy supply security

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

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

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

⁵⁸ *General Energy Council & Advisory Council on International Affairs, “Energised foreign policy. Security of energy supply as a new key objective”, December 2005, pp. 11 and 12, to be found at www.aiv-advies.nl.*

⁵⁹ *Also see GISS Annual Report 2007, www.jaarverslag.aivd.nl, pp. 66 and 67.*

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

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

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

The Committee has established that the investigations of the FI unit into energy supply security usually show a sufficiently clear connection with national security. The Committee came across one investigation where this was not the case. The reasons stated to substantiate the investigative proposal were flawed, but the Committee has established that the investigation itself was in fact conducted in the interest of national security. The case is discussed in greater detail in the secret appendix to the report. It was a short-term investigation project which has meanwhile been terminated and which was carried out in the context of the early warning quick response task. Pursuant to the designation order this task aims at the early recognition and identification of and response to developments in countries or regions which are not mentioned in the secret appendix to the designation order but which do pose a potential threat to national security. In the intelligence request from the ministry of Foreign Affairs, not only the security of energy supply, but also Dutch

trading interests form an important part of the reasons stated for the request. GISS had copied these interests into its statement of reasons for the investigation proposal. In the applications for telephone taps these interests again constituted the key element. There was no reference to national security nor any indication that it was legitimate to use the early warning quick response task. In the Committee's opinion the reasons stated for the investigation project and for using a telephone tap were flawed and incompatible with what the Second Chamber had said about vital economic interests in the legislative history. GISS must itself examine intelligence requests from the ministry of Foreign Affairs in the context of the early warning quick response task against its statutory mandate and in doing so it must bear in mind the legislative history.

5.2 Use of special powers, generally

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

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

The reasons stated for the use of special powers in the context of performing the foreign intelligence task demonstrate that the FI unit's actions are well-considered. When stating the reasons for using special powers, however, the FI unit often gives only a scant

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

description of the potential harm to national security that is involved. As was explained in section 3.5.1, it follows from the case law of the ECtHR that privacy-infringing powers may only be used if there is a possibility that national security will be harmed. The Committee therefore recommends that henceforth the FI unit give a more detailed description of the potential harm to national security.

5.3 Deployment of agents and informers

5.3.1 General

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

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

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

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

“GISS is aware that with regard to operations abroad the actions of the service’s employees are to be prepared as carefully as possible on account of the applicable local legislation, which often differs from Dutch legislation, and the risk of disrupting diplomatic relations.”⁶¹

The Committee has established that operations abroad require a special effort of the operational employees involved and their superiors. Operational employees working abroad

⁶¹ CTIVD review report no. 8b on the deployment by GISS of informers and agents, more in particular abroad, no parliamentary documents, to be found at www.ctivd.nl.

are on the one hand expected to be very independent and on the other hand they must act in conformity with what has been agreed and operational regulations. This may create difficult situations. Situations may occur, for example, in which an operational employee must take an important operational decision but is unable to consult with his superior.

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

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

The importance of complying with internal procedures is also noticeable in the difference between informer status (article 17, ISS Act 2002) and agent status (article 21, ISS Act 2002). An informer who is gathering information is not controlled by the service, while an agent is. The explanatory memorandum explains with respect to article 21 that an agent is a natural person purposefully deployed for the targeted collection of information which may be important for the performance by the service of its task.⁶³ This means that a special power is used only when an agent is deployed. No statutory requirement of prior permission applies to the deployment of informers. Permission for deploying an agent must be obtained every three months.⁶⁴ The three-monthly application for permission serves at

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

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

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

the same time as a periodical evaluation of the agent operation. In the application the applicant must demonstrate the necessity, subsidiarity and proportionality of deploying the agent, substantiated by reasons based on the experiences of the past months.

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

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

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

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

5.3.2 Operational security of informers and agents abroad

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

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

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

In addition, the Committee recommends that GISS will not start an operation in a region that may pose great risk to its agent until it has collected sufficient objective information to be able to thoroughly assess the risks of the agent's activities in the region in question.

5.3.3 Documentation

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

In the past years the quality of the files on human sources at GISS was evaluated several times. The shortcomings occurred mainly in the fields of administrative processing, administrative procedures and discipline. This had the result that the accuracy of the source files of agent

operations was insufficiently safeguarded. It emerges from both the examination of the files and the interviews conducted by the Committee that for a long time the FI unit gave insufficient attention to agent files. Internal evaluations of a number of agent operations demonstrated that poor documentation was one of the causes of operational inaccuracies and negligence in the legal sense. When examining the files the Committee came across several files that were incomplete or in which applications for permission for or extension of the deployment of the agent were lacking or filed late; the most important of these were already mentioned in section 5.3.1. The Committee has established that efforts are currently being made to solve the administrative and documentation problems and that there are noticeable improvements in this area. The Committee emphasizes the importance of proper documentation, in particular for agent operations.

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

5.3.4 Financial records

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

5.3.5 Termination of the deployment of informers and agents

GISS may decide for various reasons to terminate its contacts with an informer or an agent. It serves the interest of national security and of the security of the person concerned to do so with due care. This, too, forms part of the duty of care of article 15, ISS Act 2002.⁶⁶ The annual changes in the designation order frequently had the result that ongoing investigations were abandoned and informers and agents had to be terminated or transferred. The entry into force of the designation order 2008-2011 was intended, among other things, to achieve greater operational stability. The Committee has not found any evidence that the service failed to comply with the duty of care in terminating or transferring human sources.

5.4 Use of Sigint

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



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



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

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

Unlike wiretaps, which require a separate and reasoned application for each telephone number, applications for the use of Sigint often cover a great many characteristics (telephone numbers, for example, or email addresses, see article 27(3), ISS Act 2002). In the review report just mentioned the Committee established that applications often do not explain to which person or organisation they relate and why specifically these characteristics must be investigated. In view of the infringement of personal privacy entailed by the use of article 27, the Committee considered this unacceptable and urged GISS to pay sufficient attention to the matter. The absence of stated reasons was cause for the Committee to refrain from expressing an opinion on the lawfulness of the application of Article 27, ISS Act 2002.⁶⁸ In her reaction to this report the minister of the Interior and Kingdom Relations stated that she agreed with the Committee on this point, but at the same time expressed her concern about practical feasibility. GISS promised it would consult with the Committee on the issue.⁶⁹ The matter has not been taken up yet.

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

The Committee has established once again that the privacy infringement entailed by the use of Sigint can be the same as that entailed by the use of wiretapping, since it allows the service to become aware of the contents of the communications.⁷⁰ GISS should therefore seriously seek to specify the person targeted with Sigint as soon as possible. This effort

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

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

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

should be made even though the results obtained by the use of Sigint are limited. The Committee will deal more thoroughly with the legal parameters for the use of Sigint in the report on the use of Sigint by DISS which has not yet been published.

5.5 Use of wiretapping

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

5.6 Provision of information to external parties

The investigations conducted by GISS in the context of the foreign intelligence task are aimed at producing relevant information for the ministries of Foreign Affairs, General Affairs, the Interior and Kingdom Relations, Economic Affairs, Agriculture and Innovation and possibly other ministries as well. The Committee's investigation shows that by far the larger part of the information is provided to the ministry of Foreign Affairs. The information is provided to the ministries concerned pursuant to article 26(1)(a), ISS Act 2002. The term "official message" is only used for these external products when they are provided to enable an authorized body to take measures against a person or organisation whose legitimate interests are harmed thereby.⁷¹ Since the information provided in the context of the foreign intelligence task will often serve to give further substance to policies or strategies, such provision of information will not be considered an official message. In fact, the FI unit mainly provides information in the form of a short intelligence report or a special intelligence analysis. A short intelligence report reports and comments on an event or development, a special intelligence analysis analyses an event or development and places it in its context.

Article 12(4), ISS Act 2002, prescribes that when the service processes information it must either mention the source or give an indication of the reliability of the information. When

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

information is provided to external parties, the duty to protect sources (article 15(c), ISS Act 2002) will often preclude mentioning the source. In those cases an indication of the reliability of the information will suffice. This applies to official messages but also to the external intelligence products provided to the ministers concerned in the context of the foreign intelligence task. It is important for the ministries receiving the messages to know the degree of reliability of the information that is made available, since they must be able to carefully assess the value of the intelligence and their reaction to it.

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

6 Conclusions and recommendations

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

for the intelligence and security services was asked to mediate in this situation. The Committee agrees that such a dispute between the services is precisely a situation that calls for a close involvement of the coordinator for the intelligence and security services aimed at solving these problems (sections 4.3.1 and 5.4).

- 6.4 It is the opinion of the Committee that the purpose for which the foreign intelligence task was established can only be served if the interests of the supplier of the intelligence (GISS) and the interests of the main receiver of the intelligence (the ministry of Foreign Affairs) are properly coordinated. The Committee considers the initiatives that have been taken to improve the coordination to be a positive development. (section 4.3.2).
- 6.5 In the review period GISS and DISS have applied themselves to holding periodic consultations at the various official levels, among other things to improve coordination with regard to subjects and regions investigated by both services. There are two areas in which the services cooperate closely. The working relationship between the services improved in the review period in regard to the performance of the foreign intelligence task, although it is never tension-free. The Committee underlines the importance of close contacts between the teams of GISS and DISS that are working on the same matters independently of each other (section 4.3.3).
- 6.6 The Committee has not found any evidence of the FI unit having investigated subjects and regions that fall outside the scope of the designation order. Occasionally, the FI unit uses special powers with regard to another, third country. The aim in such cases is to investigate the relation between the third country and the country mentioned in the designation order and to obtain information on the investigated country via the third country. Consequently, the purpose is still to collect intelligence about countries falling within the scope of the designation order. The Committee has not established that the FI investigated the third countries themselves (section 5.1.1).
- 6.7 The Committee has established that the FI unit conducts its investigations of energy supply security within the statutory mandate of GISS. The Committee came across one case in which Dutch trading interests constituted an important part of the reasons stated for the investigation project and also of those stated for the use made of wiretapping in this context. It is the opinion of the Committee that basing the use of wiretapping on such reasons is incompatible with what the Second Chamber said about vital economic interests in the legislative history (section 5.1.2).
- 6.8 The reasons stated for the use of special powers in the context of the foreign intelligence task demonstrate that the FI unit's actions are well-considered. When

stating the reasons for using special powers, however, the FI unit often gives only a scant description of the potential harm to national security that is involved. It follows from the case law of the ECtHR that privacy-infringing powers may only be used if there is a possibility that national security will be harmed. The Committee therefore recommends that henceforth the FI unit give a more detailed description of the potential harm to national security when stating the reasons for the use of special powers (section 5.2).

- 6.9 The Committee came across two cases in which operational employees acted negligently and very negligently, respectively, while operating abroad. The fault for the negligent conduct did not lie only with the employees involved, but also regarded the responsibility of the direct superiors. These superiors were insufficiently committed to the activities of the operational employees (section 5.3.1).
- 6.10 De Committee emphasizes the necessity of giving adequate guidance to operational employees who, for the purposes of the foreign intelligence task, maintain contacts with sources located abroad. It considers it highly important that the service uses its knowledge and experience of the foreign intelligence task to work on improving the preparatory work for operational activities abroad and on a more systematic and timely evaluation of these operations. The Committee envisages a role in this matter for the GISS department responsible for supervising these activities. In this kind of situations it is essential that the home base keeps an eye on the operations abroad and the operational employees, so that any operational problems are identified at an early stage and any necessary adjustment can be made (section 5.3.1).
- 6.11 The Committee came across two cases in which an agent was deployed while no permission to do so had been obtained in accordance with the provisions of article 21, ISS Act 2002. Consequently, in the period during which such permission was lacking the deployment of the agents was unlawful. This situation contributed to the failure to take well-considered operational decisions (section 5.3.1).
- 6.12 Pursuant to article 43(2), ISS Act 2002, information which has been wrongfully processed must be destroyed. It is, however, problematic to destroy information obtained from human sources. Pursuant to article 15(c), ISS Act 2002, GISS has a duty to ensure the security of sources. In order to be able to assess what are the risks to a source, the service must be aware of the details regarding the contacts with the source and the information provided by the source. In this situation it is not responsible to destroy information. In the case of the two aforementioned operations the information must in fact be kept, but not be used for any purposes other than ensuring the security of the source (section 5.3.1).

- 6.13 The Committee has identified one case in the context of the performance of the foreign intelligence task in which GISS failed in its duty to ensure the security of persons who cooperate in the collection of information (article 15(c), ISS Act 2002) (section 5.3.2).
- 6.14 In view of the special risks entailed by operations taking place abroad, the Committee recommends that the service, prior to deploying an agent to a possibly high-risk region, prepares a risk analysis which takes account of the personality of the agent in relation to his assignment, his motivation and his reliability. This serves the purpose of assessing whether the agent is suited for operating abroad on his own and will not endanger himself and the interests of the service. In addition, the Committee recommends that GISS will not start an operation in a region that may pose great risk to its agent until it has collected sufficient objective information to be able to thoroughly assess the risks of the agent's activities in the region in question (section 5.3.2).
- 6.15 The Committee has established that for a long time the FI unit paid insufficient attention to agent files. Internal evaluations of a number of agent operations demonstrated that poor documentation was one of the causes of operational inaccuracies and negligence in the legal sense. When examining the files the Committee came across several files that were incomplete or in which applications for permission for or extension of the deployment of the agent were lacking or filed late. The Committee has established that efforts are currently being made to solve the administrative and documentation problems and that there are noticeable improvements in this area. The Committee emphasizes the importance of proper documentation in accordance with the provisions of article 16(a), ISS Act 2002, in particular for agent operations (section 5.3.3).
- 6.16 The Committee came across a considerable number of agent operation files which did not contain an operation plan. The Committee holds the opinion that the preparation of an operation plan can contribute considerably to the careful and effective execution of an agent operation. In addition, the presence of an operation plan will facilitate stating adequate reasons for either continuing or ending an operation. The Committee therefore finds it preferable to draw up an operation plan for every agent operation. The Committee recommends including this in the internal regulations (section 5.3.3).
- 6.17 In the case of one agent operation the Committee was struck by the financial aspect of the operation. Substantial sums were paid in this operation. After the financial plan for this operation had been approved, circumstances turned out to have

changed, with the result that it was no longer justified to spend the estimated sum. The estimated sum was, however, spent. In this period managers and the accounting department did not check whether and how the money had been spent. This lack of financial verification surprises the Committee (section 5.3.4).

- 6.18 The annual changes in the designation orders frequently had the result that ongoing investigations were abandoned and informers and agents had to be terminated or transferred. The Committee has not found any evidence that the service failed to comply with the duty of care under article 15, ISS Act 2002, in terminating or transferring human sources (section 5.3.5).
- 6.19 The Committee has established that the FI unit, when using article 27, ISS Act 2002, often does not specify for each characteristic to whom it belongs and why it is important to possess the information to be obtained through this specific characteristic. The Committee has established that the privacy infringement entailed by the use of Sigint can be the same as that entailed by the use of wiretapping, since it allows the service to become aware of the contents of the communications. GISS should therefore seriously seek to specify the person targeted with Sigint as soon as possible (section 5.4).
- 6.20 A number of applications from the FI unit for approval to use or extend the use of article 25, ISS Act 2002, gave the Committee cause for further observations in the secret appendix to the report. With respect to some operations the Committee urges GISS to take greater care in stating the reasons. With respect to one operation the Committee repeats what it already established in the secret appendix to its report on the application by GISS of articles 25 and 27, ISS Act 2002. The Committee held, and still holds, the opinion that the operation was unlawful. Apart from these findings the Committee has not detected further unlawful (section 5.5).
- 6.21 The Committee has established that many products provided to external parties in the context of the foreign intelligence task mention neither the source nor the degree of reliability of the information. This procedure is not in keeping with article 12(4), ISS Act 2002. This article prescribes that either the source or the degree of reliability must be mentioned. The Committee urges GISS to adjust the procedure (section 5.6).

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

**Review Committee on the
Intelligence and Security Services**

Anna van Saksenlaan 50

2593 HT The Hague

Internet: www.ctivd.nl

E-mail: info@ctivd.nl