

A pair of golden scales of justice is centered in the image, set against a blue background featuring a world map and a network of white lines. A thick teal diagonal band with a white stripe runs across the top left. The scales are slightly tilted, with the right pan lower than the left.

Review report

The AIVD and MIVD weighting notes for the international cooperation with the Counter Terrorism Group and sigint partners

CTIVD no 60

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Review Committee
on the Intelligence and
Security Services

CTIVD no 60

REVIEW REPORT

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the international cooperation with the
Counter Terrorism Group and sigint partners

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The AIVD and MIVD weighting notes for the international cooperation with the Counter Terrorism Group and sigint partners

This review report deals with the weighting notes of the General Intelligence and Security Service (AIVD) and the Military Intelligence and Security Service (MIVD) for the lead group of international cooperative partners. The lead group consists of European security services participating in the cooperative partnership Counter Terrorism Group (CTG) and the foreign intelligence and sigint services participating in certain cooperative relationships in the area of sigint.¹ At the end of 2017, the Minister of the Interior and Kingdom Relations and the Minister of Defence assured parliament that the weighting notes for these intensive cooperative relationships would be ready when the ISS Act 2017 came into effect.² The Review Committee on the Intelligence and Security Services (CTIVD) established that this undertaking was met and subsequently reviewed the weighting notes on lawfulness.

In essence, weighting notes are a written justification for the decision to cooperate with a foreign service and for the content of that cooperation (intensity and forms of cooperation). The interest of the cooperative relationship is weighed against the associated risks. The weighting note maps out these risks based on five cooperation criteria specified in the Act: (a) democratic anchorage, (b) respect for human rights, (c) professionalism and reliability, (d) legal powers and possibilities and (e) the level of data protection provided. Ultimately all cooperation criteria lead to the key question: how great is the risk that there will be unjustified interference with the fundamental rights of individuals within this cooperative relationship?

The level of risk found to be acceptable depends, among other things, on the national security interest served by the cooperation. It also depends on the options that exist to mitigate the risks and the specific content of the cooperation. The fact that risks are established in a cooperative relationship does not mean that cooperation is ruled out in advance, but it is an indication that additional safeguards are needed. These considerations must be laid down in the weighting note in such a way that it forms a sound legal foundation for cooperation.

If the foundation (the weighting note) is weak, this results in an unstable structure (the cooperation). That does not imply that the cooperation is unlawful by definition. There may be situations in which action is required despite not having a complete picture of the risks or even in the full knowledge of considerable risks because the operational interest in protecting national security is great.³ The law deliberately leaves room for these situations.

¹ Sigint is short for *signals intelligence*; intelligence collected through the interception of electronic signals.

² Letter from the Minister of the Interior and Kingdom Relations and the Minister of Defence to the House of Representatives, dated 15 December 2017, *Parliamentary documents II 2017/18*, 34588 no. 69.

³ The reasons for this are explained in the substantiation of the specific cooperative activity that can be seen as a second safeguard, after the weighting note.

This report looks at the mandate given by the Minister of the Interior and Kingdom Relations to the director-general of the AIVD (DG-AIVD) for the power to grant authorization to enter into cooperative relationships where it concerns low-risk services. According to the CTIVD, the substance of this decision is contrary to the legislature's purpose because the explanatory memorandum to the Act explicitly speaks out against implementing the mandate based on the distinction between high-risk service and low-risk services. This mandate decision has effectively cancelled the safeguard of prior ministerial authorization for the majority of the AIVD's cooperative relationships. This safeguard has also been lost for the lead group of cooperative partners in the context of CTG and sigint, while, from the perspective of the content of the cooperation and the intensive exchange of data, these are cooperative relationships that are particularly in need of authorization at the highest political level and therefore from outside the AIVD. This includes services with which unevaluated data is exchanged on a structural basis. The CTIVD views the lack of ministerial authorization for the cooperative relationships with these services as undesirable. In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations indicated she would amend the implementation of the mandate. It is as yet not entirely clear to the CTIVD how the mandate decision will be amended.

The Minister of Defence opted *not* to mandate her power to grant authorization for the MIVD to enter into or continue cooperative relationships. As a result, ministerial authorization to continue cooperation with sigint partners has been legally required since the introduction of the ISS Act 2017 on 1 May 2018. An unlawful situation existed for a short period as this authorization was granted six weeks after that date.

In its report, the CTIVD called attention to the fact that the AIVD in practice makes an unlawful distinction between legal cooperation criteria, which results in the criteria (d) legal powers and possibilities and (e) level of data protection not being fully weighed. Consequently, the category cooperative relationships requiring ministerial authorization is in fact restricted because failure to comply with criteria (d) and (e) does not lead to the foreign service being designated as a high-risk service. In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations stated that if in future the criteria "legal powers" and "level of data protection provided" are not met, the outcome should automatically be "high-risk service".

The investigation shows that both the AIVD and the MIVD have a long way to go before the contents of the weighting notes for the lead group of international cooperative partners are up to standard. All the weighting notes require improvement to some degree if they are to provide a clear view of the risks of the cooperation.

The AIVD has been shown to be structurally inadequate in its efforts to identify the level of data protection provided, the legal powers and (technical) possibilities of the foreign service and the risk that the cooperation contributes towards illegal targeting.⁴ Moreover, all the AIVD weighting notes lack an explicit weighting of the interest of the cooperation against the risks. Nor is it clear to what extent the mentioned risks can be mitigated by setting further preconditions.

The CTIVD reviewed over 40 AIVD weighting notes,⁵ of which 24 show a lack of substantiation in one or more areas. In these weighting notes, the content of certain cooperation criteria does not support the conclusion, for example the criterion (e) level of data protection is marked as 'sufficient', while insufficient information is provided about the safeguards in that area. In a case such as this, the CTIVD does not understand why this criterion is given a positive assessment, if no further explanation is

⁴ Targeting is a process of selecting and prioritizing goals that could lead to use of force by the armed forces to achieve a certain tactical or strategic objective. Illegal targeting is targeting that is in contravention of international law.

⁵ It is not possible to list the exact number, as the number of sigint cooperative partners is state secret. 'Over 40' relates to the 29 CTG partner services and a number of sigint cooperative partners.

provided. The substantiation is therefore flawed. One of the weighting notes investigated by the CTIVD fails to report and weigh information that should have led to a negative assessment of the professionalism and reliability criterion.

The MIVD weighting notes paint a more positive picture. The number of weighting notes is fewer than ten.⁶ These notes provide a transparent weighting in which sufficient attention is paid to the importance of the cooperation, the risks and the associated implications. The assessment of the cooperation criteria is generally also substantiated sufficiently. In six of the weighting notes, the assessment of the level of data protection was insufficiently substantiated and in one weighting note this was also the case for the criterion legal powers and possibilities.

The AIVD and MIVD weighting notes in which the conclusion is not supported by the content do not comply with the ISS Act 2017 in that respect and as a result are unlawful in some aspects. These deficiencies must therefore be corrected at short notice. It is furthermore necessary that the recommendations made in this report for the interpretation of the cooperation criteria are incorporated in the weighting notes for the CTG and sigint partners and in the services' future procedure. Both ministers indicated in their response on 17 December 2018 to the drafted review report that the weighting notes had been or would be amended or reviewed.

⁶ It is not possible to list the exact number, as the number of sigint cooperative partners is state secret.

REVIEW REPORT

The AIVD and MIVD weighting notes for
the international cooperation with the
Counter Terrorism Group and sigint partners

1. Introduction

Wat are weighting notes?

The General Intelligence and Security Service (AIVD) and the Military Intelligence and Security Service (MIVD) are authorized to enter into cooperative relationships with foreign intelligence and security services (hereinafter: foreign services), in so far as these services qualify. To determine whether that is the case, a weighting must be conducted based on the new Intelligence and Security Services Act 2017 (ISS Act 2017) using a number of cooperation criteria. These criteria relate to matters such as the respect for human rights in the country in question or the level of data protection that the foreign service can offer.⁷ This weighting serves to identify the risks of cooperation before a final decision is taken about the proposed cooperative relationship. That decision not only concerns entering into the cooperation, but also the content of the cooperation. In part, that also depends on the established risks. 'In part' is used here deliberately because the content of the cooperation also depends on the national security interest that is served. The greater the interest, the more risks can and must be accepted in the cooperation. That could mean that the cooperation with a foreign service in a specific case extends beyond what is permitted according to the weighting note, because of compelling operational reasons.⁸ Legislation allows scope for this, given the reality that in international cooperation the door is never fully closed. Indeed, there may be crucial information behind that door about a concrete threat to the Netherlands.

Before the cooperative relationship can be entered into, the risks are weighed and recorded in a weighting note. That document thus forms the foundation on which the cooperation by the AIVD or the MIVD is based. This kind of legal foundation is required, not only for new but also for existing cooperative relationships that are continued.

⁷ Other legal weighting criteria are: (a) the democratic anchorage of the service in the relevant country, (c) the professionalism and reliability of the service and (d) the legal powers and possibilities of the service (Section 88(3) (a), (c) and (d) of the ISS Act 2017).

⁸ This requires authorization from the minister (Section 64(2) of the ISS Act 2017).

Why investigate weighting notes?

The ISS Act 2017 for the first time explicitly imposes a legal requirement on the AIVD and the MIVD to conduct a weighting for new and existing cooperative relationships based on the cooperation criteria.⁹ To prevent existing cooperative relationships having to be discontinued due to the lack of a weighting note, the ISS Act 2017 stipulates that the obligation to conduct a weighting note remains inapplicable for a period of two years. In its response to the Act, the Review Committee on the Intelligence and Security Services (CTIVD) repeatedly expressed its concern over the lack of protection of fundamental rights that would exist during this transition period. Even before the new ISS Act was introduced, two significant pledges were made by the ministers in question: (1) the weighting notes of the lead group of trusted cooperative partners would be complete before 1 May 2018 at the latest¹⁰ and (2) the other weighting notes for existing cooperative relationships would be completed before 1 January 2019.¹¹ The ministers added that the CTIVD could immediately commence its review as soon as a weighting note has been established.¹²

Given the importance of a sound legal basis for the cooperation with the lead group of partners, the CTIVD decided to investigate compliance with the first undertaking immediately following the introduction of the ISS Act 2017. This concerns the weighting notes for the 29 foreign services with which the AIVD cooperates in the Counter Terrorism Group (CTG) and for services with which the AIVD and the MIVD work closely in the context of sigint cooperation. The AIVD and the MIVD enter into far-reaching forms of cooperation with these services and intensive data exchange takes place, including the exchange of unevaluated data. Continuing these cooperative relationships, without thoroughly identifying, weighing and, where possible, mitigating the risks would be irresponsible even where it concerns trusted partners. This investigation also provides the opportunity to see if the services are on the right track with their weighting notes and if they followed previous recommendations made by the CTIVD, and to adjust the process, where necessary, by providing further recommendations. This includes the recommendation that the services assess their cooperative relationships on transparency and specify the considerations underlying the cooperation.¹³ When transparency is referred to in this report, it refers to the level of required information about the foreign service that was publicly available and, where relevant, to what extent the foreign service was willing to provide this information to the AIVD and the MIVD.¹⁴

What did the CTIVD investigate?

On 9 May 2018, the CTIVD announced that it would conduct an investigation into the established weighting notes for the closest cooperative relationships of the AIVD and the MIVD. It asked the following investigative questions:

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- ⁹ The CTIVD did recommend in its reports no. 22A about the AIVD's cooperation with foreign intelligence and security services (*Parliamentary Documents II* 2009/10, 29 924, no. 39 (appendix)) and 22B about the MIVD's cooperation with foreign intelligence and security services (*Parliamentary Documents II* 2014/15, 29 924, no. 128 (appendix)) that the services should first make a fundamental assessment at their management level - prior to any concrete cooperation activities - based on the cooperation criteria arising from the legislative history of the ISS Act 2002. This recommendation was adopted by the ministers. In this respect, the Act thus codifies the obligation that the ministers had undertaken at an earlier stage. Both reports can be found on www.ctivd.nl.
 - ¹⁰ Letter from the Minister of the Interior and Kingdom Relations and the Minister of Defence to the House of Representatives, dated 15 December 2017, *Parliamentary documents II* 2017/18, 34588 no. 69.
 - ¹¹ Letter from the Minister of the Interior and Kingdom Relations and the Minister of Defence to the House of Representatives, dated 6 April 2018, *Parliamentary documents II* 2017/18, 34588 no. 70.
 - ¹² Letter from the Minister of the Interior and Kingdom Relations and the Minister of Defence to the House of Representatives, dated 15 December 2017, *Parliamentary documents II* 2017/18, 34588 no. 69.
 - ¹³ CTIVD review report no. 38 on the processing of telecommunications data by the AIVD and the MIVD, *Parliamentary Documents II* 2013/14, 29 924, no. 105 (appendix), available at www.ctivd.nl
 - ¹⁴ The explanatory memorandum to the ISS Act 2017 indicates that in the context of transparency an assessment is made to what extent foreign services provide an insight into their tasks, powers and procedure. It can be said that insufficient transparency is a strong counter indication for cooperation. *Parliamentary Documents II* 2016/17, 34588, no. 3, p. 161.

I. Did the Minister of the Interior and Kingdom Relations and the Minister of Defence fulfil their pledge that the weighting notes for the lead group of trusted partners would be complete by 1 May 2018?

II. Do the established weighting notes comply with the ISS Act 2017?

The lead group of the partner services consists firstly of the 29 security services with which the AIVD cooperates closely in the context of CTG: the security services of the EU countries, Norway and Switzerland.¹⁵ The AIVD and the MIVD work closely with different intelligence and sigint services in various cooperative partnerships related to the exchange of data obtained through sigint.¹⁶ This is a group of foreign services numbering fewer than ten. The lead group consists of over 40 cooperative partners in total.¹⁷

This is the first time review takes place based on the new legal framework for international cooperation in the ISS Act 2017. In a number of aspects, the CTIVD drew on the explanatory memorandum and the parliamentary debate on the new Act to further clarify the meaning and purpose of the legal provisions.

In this case, the review carried out by the CTIVD does not relate to the process, but to the result: the contents of the weighting notes. These were assessed for lawfulness at face value. That means that the information in the weighting notes about the relevant foreign service and the relevant country was used as a starting point for the assessment. The CTIVD reviewed whether that information can support the service's conclusions. Conclusions means the score ('sufficient', 'insufficient' or - in the MIVD weighting notes - 'moderate') indicated in the weighting note about the different cooperation criteria and general outcome of the weighting. Where the CTIVD concludes that the information does not support the conclusions of the weighting notes (in certain aspects), the conclusions could perhaps be retained if the substantiation is improved. However, a substantiation that does not support the conclusions means that at that time there is no sound legal basis for cooperation, which is unlawful.

What falls outside the scope of the investigation?

The weighting notes used by the services are the first safeguard where international cooperation is concerned. The lawfulness of the cooperation activities themselves (therefore: the exchange of data or operational cooperation) also depends on the assessment in each specific case. The substantiation and authorization at the required level is the second safeguard. This investigation focused only on the first safeguard: the weighting notes.

The cooperation in practice and the question whether that is kept within the boundaries of the weighting note and of the authorization for the specific cooperation activities also lie outside the scope of the investigation. The CTIVD deems it relevant to first establish if the basis (i.e. the weighting note) is correct.

The CTIVD will review the practice of exchanging unevaluated data in the coming period. That investigation was announced on 26 October 2018 and ties in with the current investigation because the exchange of unevaluated data mainly takes place with the lead group of the cooperation partners.

¹⁵ The cooperation therefore consists of the security services from Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Poland, Portugal, Rumania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom, Norway and Switzerland.

¹⁶ Sigint is short for *signals intelligence*; intelligence collected through the interception of electronic signals.

¹⁷ It is not possible to list the exact number, as the number of sigint cooperative partners is state secret. 'Over 40' relates to the 29 CTG partner services and a number of sigint cooperative partners.

Structure of the report

Chapter 2 contains the assessment of the AIVD weighting notes. This chapter is divided into the topics: the undertaking to the House of Representatives (Section 2.1), the authorization to enter into cooperative relationships (Section 2.2), the conclusion high-risk service (Section 2.3) and the overall view of the content of the weighting notes (Section 2.4). **Chapter 3** discusses the MIVD weighting notes: the undertaking to the House of Representatives (Section 3.1), the authorization to enter into cooperative relationships (Section 3.2) and the overall view of the content of the weighting notes (Section 3.3). **Chapters 4 and 5** contain the conclusions and recommendations by the CTIVD.

Appendix I to the report describes the assessment framework that the CTIVD used to assess the weighting notes. **Appendix II** contains a further explanation of the deficiencies in the content of the weighting notes of both services that are mentioned in the overall view. **Appendix III** looks in more detail at the process of drawing up the weighting notes. The cooperation between the AIVD and the MIVD in this respect is also addressed. The justification for the investigation plan and investigation methodology used can be found in **Appendix IV**. Finally, **Appendix V** contains the list of definitions included in the report.

This review report has **no** classified appendix.

2. AIVD weighting notes

2.1 Undertaking to the House of Representatives

The investigation by the CTIVD shows that all weighting notes of the foreign services with which the AIVD works closely in connection with CTG and/or sigint had been adopted by the director-general of the AIVD (DG-AIVD) before 1 May 2018. That means that the undertaking to the House of Representatives that the weighting notes for the lead group of international partners would be ready when the ISS Act 2017 came into effect has been met.

2.2 Authorization for entering into cooperative relationships

As a result of the AIVD Mandate Decision regarding cooperation with foreign intelligence and security services 2018,¹⁸ the DG-AIVD has the power on a structural basis to grant authorization to enter into cooperative relationships where it concerns low-risk services. The minister should be informed of the granted authorization as soon as possible by the DG-AIVD. Given that all foreign services within the lead group of CTG and sigint partners have been designated as low-risk services based on the AIVD weighting notes, the Minister of the Interior and Kingdom Relations was not asked for authorization to continue the cooperation. The DG-AIVD granted authorization himself when adopting the weighting notes (before 1 May 2018). The weighting notes of the CTG services were submitted to the minister for her information at the end of April 2018. At the end of May 2018, the weighting notes of the sigint cooperation partners followed.

The CTIVD is of the opinion that the structural mandate of the power to grant authorization to enter into cooperative relationships with low-risk services is contrary to the legislature's intention in a substantive sense. The explanatory memorandum to the ISS Act 2017 specifically indicates that the minister responsible for the service should in principle grant authorization him/herself regardless of whether or not it concerns high-risk services. The possibility of granting a mandate is described as supplementary.¹⁹ It appears from these sections that if a mandate is opted for, it should not be done on a structural basis along the lines high-risk/low-risk service. In addition, this practice actually creates a different situation than the one described in the explanatory memorandum: where prior ministerial authorization should be the starting point, it has now become an exception because the majority of foreign services is designated as low-risk service by the AIVD. That means that a significant safeguard for international cooperation was already substantially weakened when the Act was introduced.

The new regime for cooperation with foreign services that was introduced with the ISS Act 2017 has a previous history in, among other things, report no. 38 of the CTIVD and the parliamentary debate on the activities of the National Security Agency (NSA).²⁰ The report and debate mentioned are concerned with the safeguards that exist when the AIVD and the MIVD cooperate with their trusted international partners in close cooperative relationships. In that light, the AIVD's argument,²¹ that only the cooperation with high-risk services is so sensitive that the minister must grant authorization, is incorrect and also outdated. In other ways, the relationships with trusted partners are just as sensitive

¹⁸ AIVD Mandate Decision regarding cooperation with foreign intelligence and security services 2018 dated 7 May 2018, Government Gazette 2018, 28232.

¹⁹ *Parliamentary Documents II* 2016/17, 34588, no. 3, p. 212.

²⁰ See the explanation to this on pages 158-160 of the explanatory memorandum to the ISS Act 2017, *Parliamentary Documents II* 2016/17, 34588 no. 3.

²¹ This argument was put forward in several interviews that the CTIVD held with AIVD staff in the context of this investigation.

as the ones with high-risk services, because of the far-reaching forms of close cooperation that take place and the amount and type of data exchanged. This concerns among other things the structural exchange of unevaluated bulk data and the exchange of personal data within an operational platform and through a database.²² From this perspective, these are in fact cooperative relationships that are particularly in need of authorization at the highest political level - and thus outside of the AIVD.

The Court of the Hague confirms this in its ruling on the interim injunction proceedings brought by a number of organizations against the state (June 2018) about the ISS Act 2017.²³ This concerned the power of the AIVD and the MIVD to provide unevaluated data in bulk to foreign services. The Court ruled on this aspect that the regulation of the power had sufficient safeguards. In its consideration, the Court specifically mentioned - as put forward by the state - the requirement of ministerial authorization both to enter into a cooperative relationship and to provide unevaluated data. It is remarkable to say the least that, at the time that this judgment was delivered, the power to grant authorization for the AIVD's cooperative relationships in which unevaluated data is exchanged had already been structurally mandated to the DG-AIVD. In fact, this safeguard no longer existed.

The CTIVD views the lack of ministerial authorization for continuing the cooperative relationships with the CTG and sigint cooperation partners as undesirable, because this goes against the explicit intention of the legislature. Continuing these close cooperative relationships, and in particular the conditions under which this takes place, requires, under the new regime of the ISS Act 2017, authorization at the highest political level by a body outside the AIVD.

The line taken that the minister only grants authorization for cooperating with high-risk services means that much depends on the definition of the term 'high-risk service' given within the AIVD. It was clear to the CTIVD that in practice the service defines this term narrowly. This topic is examined in more detail below in Section 2.3.

In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations indicated she would amend the interpretation given to the mandate. It is as yet not entirely clear to the CTIVD how the mandate decision will be amended.

2.3 Conclusion high-risk service

The most important conclusion of the AIVD weighting notes is the question whether or not the relevant foreign service is a high-risk service. If it concerns a high-risk service, higher authorization levels are required for specific cooperation activities (for example, providing personal data) and the weighting note must be adopted by the minister. In other words: cooperation with a high-risk service is possible, but must go hand in hand with additional safeguards.

The term high-risk service is defined as follows in the explanatory memorandum to the ISS Act 2017: "A service with which cooperation constitutes a risk based on the weighting criteria referred to in Section 88(3)." When assessing whether or not a service is high-risk, the AIVD chose in its policy to give more weight to the criteria (a) democratic anchorage, (b) human rights and (c) professionalism and reliability than to the criteria (d) legal powers and possibilities and (e) level of data protection. The AIVD alleges that where an 'insufficient' on the criteria (a), (b) or (c) leads to the conclusion that a the service in question is high-risk, that is not necessarily the case for criteria (d) or (e). A wider margin

²² See CTIVD review report no. 56 on the multilateral exchange of data on (alleged) jihadists by the AIVD, *Parliamentary Documents II* 2017/18, 29924, no. 160 (appendix), available at www.ctivd.nl

²³ Court of The Hague 26 June 2018, ECLI:RBDHA:2018:7459, paragraphs 4.32 and 4.33.

of appreciation was assumed because in practice it proved difficult to clarify those criteria for the weighting. If there is initially too little data to form an opinion for these criteria, while the other criteria are marked as sufficiently met, the outcome could be that it does not concern a high-risk service.²⁴

The CTIVD feels that this interpretation does not do justice to the importance of the criteria (d) legal powers and possibilities and (e) level of data protection. If there is too little data to form an opinion on those aspects, that says something about the transparency of the foreign service in question.²⁵ When in 2014 the Minister of the Interior and Kingdom Relations and the Minister of Defence adopted the CTIVD's recommendation to assess cooperative relationships for transparency and to further define the assessments underlying the cooperation,²⁶ it was already known that it was hard to obtain more information about the legal powers and technical possibilities of a foreign service. However, after the Snowden revelations, the conviction was that the AIVD and the MIVD nevertheless had to try to collect sufficient information about this to come to a balanced decision.²⁷ This was an important step forward. Where the level of data protection is concerned, a clear picture of the safeguards in this area is essential to be able to assess whether personal data and unevaluated data may be provided to the relevant foreign service. If that picture is incomplete, it constitutes a risk by definition. These criteria should therefore have the same weight as the other three in assessing whether or not it concerns a high-risk service.

The investigation by the CTIVD shows that, in practice, the AIVD draws a hard line between criteria (a), (b) and (c) and criteria (d) and (e). The current procedure means that failing to meet criteria (d) or (e) by definition does not lead to the assessment of a high-risk service. One of the weighting notes assessed by the CTIVD in this investigation is an example of this. In that particular case, the AIVD marked *both* criteria (d) legal powers and possibilities and (e) level of data protection as insufficient while nevertheless designating this service as a low-risk service without offering any substantiation. The CTIVD finds this to be unlawful. Under the Act, a full weighting of all cooperation criteria must take place and should lead to additional safeguards if two of the cooperation criteria have not been met.

The CTIVD points out that this procedure in fact forms a restriction of the cases in which ministerial authorization is required to enter into a cooperative relationship (see Section 2.2). At the time of its investigation, the minister was only asked for authorization if a foreign service did not comply with criteria (a), (b) and/or (c) according to the weighting note. That means that this safeguard, which is already limited because of the mandate, is thus further compromised in practice.

In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations stated that in future if the criteria "legal powers" and "level of data protection provided" are marked as insufficient, the outcome should be 'high-risk service'.

2.4 Overall view on the contents of the weighting notes

The AIVD weighting notes are structured clearly, first discussing the conclusions (Chapter 1), then information about the country and relevant service (Chapter 2) and finally the assessment based

²⁴ Explanation to the AIVD Mandate Decision regarding cooperation with foreign intelligence and security services dated 7 May 2018, *Government Gazette* 2018, 28232.

²⁵ The explanatory memorandum to the ISS Act 2017 indicates that in the context of transparency an assessment is made to what extent foreign services provide an insight into their tasks powers and procedure. It can be said that insufficient transparency is a strong counter indication of cooperation. *Parliamentary Documents II* 2016/17, 34588, no. 3, p. 161.

²⁶ Letter from the Minister of the Interior and Kingdom Relations and the Minister of Defence, dated 11 March 2014, *Parliamentary Documents II* 2013/14, 29924, no. 105.

²⁷ The debate on interception by the NSA and the role of the Netherlands in this activity, dated 9 April 2014, *Proceedings II* 2013/14, 73.

on the cooperation criteria (Chapter 3). The AIVD weighs the cooperation based on ten cooperation criteria, including the cooperation criteria contained in the Act.²⁸ The other criteria used by the AIVD are: “similar tasks of the foreign service”, “advisability in the context of international commitments”, “enhancing the performance of tasks” and “level of reciprocity (*quid pro quo*)”. The criterion “similar tasks of the foreign service” concerns the question whether the foreign service’s tasks correspond with those of the AIVD to a sufficient degree. For example, that may mean indicating whether or not the service also has criminal investigative tasks. This criterion is closely linked to the legal criterion (d) legal powers and possibilities. The other cooperation criteria that the AIVD uses on its own initiative relate to the question whether it is opportune to cooperate with the foreign service in question. This is a consideration that differs from the legal cooperation criteria, where it concerns the risk that the cooperation will lead to unjustified interference with the fundamental rights of individuals. In this investigation, the CTIVD only conducted its review against the legal criteria.

In its conclusions, the AIVD provides an overview of the scores of the cooperation criteria (“sufficient” or “insufficient”). Subsequently, any risks in the cooperation are noted and the importance of the cooperation is briefly discussed. The section under the heading “Weighting of the cooperation” indicates which forms of cooperation are permitted and lists the corresponding authorization levels. In the view of the CTIVD, this does not constitute a weighting. It may be a result of a weighting, but is not the actual weighting itself. The AIVD weighting notes lack that explicit weighting. Although Chapter 1 does indicate the risks of the cooperation and the importance of the cooperation, no connection is made between the two. A number of weighting notes specify an “area of concern” under the heading “Possible risks of the cooperation”, without it becoming clear what the effect is on the weighting. In that respect, the AIVD weighting notes do not comply with the requirements laid down by the ISS Act 2017 for the contents of the weighting notes.

In principle the AIVD opted not to focus in its weighting notes on the measures that could be taken to mitigate any risks of the cooperation. Such measures might include not providing data about certain topics, additional restraint when providing personal data or setting conditions in writing (disclaimers). An exception is the higher authorization levels that apply for cooperative activities when it concerns a high-risk service and the use of a disclaimer for foreign services that also have tasks in criminal investigation. The reason not to discuss mitigating measures in the weighting notes in general is, according to the AIVD, that these only come into play when a specific cooperative activity is being considered. According to the service’s procedure, any mitigating measures must be mentioned in the substantiation of specific cooperative activities (for example, providing personal data).²⁹ The CTIVD is of the opinion that this interpretation is not in accordance with the ISS Act 2017. A weighting note should also indicate which preconditions apply to the cooperation. It makes sense that each specific cooperative activity is looked at to see if any further preconditions must be set, but the CTIVD is of the opinion that this should also be looked at across the entire cooperative relationship and be recorded in the weighting note. That is not only a necessary guideline for the users in practice but also influences the weighting itself.

The AIVD concludes in all weighting notes investigated, except one, that all cooperation criteria were met and that all forms of cooperation are permitted. All CTG and sigint partner services are designated as low-risk services.

²⁸ The AIVD divided the legal cooperation criteria “professionalism and reliability” into two criteria.

²⁹ The Act uses the system of a two-fold assessment that applies to cooperative activities in specific cases, such as providing personal data to a foreign service. The two-fold assessment consists firstly of the consideration: (1) Does the activity (provision of data) fit within the limits of cooperation, as defined in the weighting note? And subsequently (2): Does the specific cooperation activity in that respect meet the requirements including those of necessity, propriety and due care?

The CTIVD established that the AIVD weighting notes concerning the CTG and sigint partner services contain structural and incidental deficiencies. For 24 weighting notes the CTIVD concludes on one or more aspects that the contents of the weighting note do not support the conclusions. This is unlawful. One of the other weighting notes fails to report information of which the AIVD had been aware for some time and which should have led to a negative assessment of the professionalism and reliability of the foreign service in question. The CTIVD also finds this to be unlawful.

This means that all weighting notes require adjustments and additions to adequately identify the risks of cooperation. An explicit weighting must be made of the importance of the cooperation against the risks and it must be clear to what extent the identified risks can be mitigated. In addition, each weighting note must take into consideration the risk that the cooperation contributes to illegal targeting.³⁰ The deficiencies established by the CTIVD are discussed further in Appendix II to this report. In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations indicated that the weighting notes have been or would be adjusted in line with the CTIVD's recommendations.

The CTIVD's assessment must be seen in the context of the extreme work pressure at the AIVD. That work pressure existed in particular for the staff engaged in drafting weighting notes, because the deadlines for establishing weighting notes for existing cooperative relationships (see Chapter 1) had been brought forward, and for the service as a whole as a result of the introduction of the new ISS Act. Although in fact the obligation to make a fundamental assessment based on the cooperation criteria dates from 2009³¹ and the work pressure need not have been as high if action had been taken earlier, this is nevertheless the situation in which the AIVD now finds itself. The staff involved are making great efforts and significant progress has been made in a relatively short time. At the same time it is no wonder that the work pressure has had an impact on the quality of the weighting notes.

³⁰ Targeting is a process of selecting and prioritizing targets that could lead to use of force by the armed forces to achieve a certain tactical or strategic objective. Illegal targeting is targeting that is in contravention of international law.

³¹ Letter from the Minister of the Interior and Kingdom Relations to the House of Representatives, dated 8 October 2009, *Parliamentary Documents II* 2009/10, 29924, no. 39.

3. MIVD weighting notes

3.1 Undertaking to the House of Representatives

The CTIVD established that the weighting notes of the foreign services with which the MIVD works closely in connection with CTG and/or sigint had all been adopted by the director of the MIVD before 1 May 2018. That means that the undertaking to the House of Representatives that the weighting notes for the lead group of international partners would be ready when the ISS Act 2017 came into effect has been met. For the MIVD this concerns the lead group of partners with which the service cooperates in the context of sigint cooperation. The MIVD is not part of the CTG cooperative partnership.

3.2 Authorization for entering into cooperative relationships

The established weighting notes were submitted to the Minister of Defence at the end of April 2018 with the request to consent to maintaining structural cooperative relationships with the foreign services in question. The information and risk analyses in the weighting notes formed the basis for this authorization. On 16 June 2018 the minister granted authorization.

The CTIVD established that the continuation of the cooperative relationships with sigint partner services lacked ministerial authorization for a period of about six weeks. This is not in accordance with Section 88(4) of the ISS Act 2017 nor with the undertaking of the Minister of Defence to the CTIVD in response to reports nos. 48 and 49 that from then on ministerial authorization would be asked for entering into cooperative relationships.³² The situation was therefore unlawful for a period of time. It must be noted, however, that the MIVD submitted the weighting notes on time to the Ministry of Defence and that all cooperative relationships with sigint partner services were ultimately approved without questions or remarks on the part of the ministry.³³

3.3 Overall view on the contents of the weighting notes

The weighting notes made by MIVD are relatively comprehensive. In Chapter 1 the weighting notes first provide a summary of the main points, so that the reader can easily see the outcome of the weighting. Chapter 2 contains a description of the country, the service and its organization. Chapter 3 contains the assessment based on the cooperation criteria. The sources used are shown in footnotes. Besides the five legal cooperation criteria, the MIVD assesses cooperation on the basis of its own three criteria: "advisability in the context of international commitments", "enhancing the performance of tasks" and "level of reciprocity (*quid pro quo*)". As noted in Section 2.4 regarding the AIVD, these are criteria that concern the question whether it is *opportune* to cooperate with the foreign service in question. The CTIVD only conducted its review against the legal cooperation criteria. Chapter 4 of the weighting notes illustrates which level of cooperation is authorized, which legal powers may be used and at what level the authorization must be given. Also noted are any preconditions for providing personal data, unevaluated data or data that could contribute to a targeting process. The actual weighting is made in Chapter 5, at the end of the weighting note. The importance of the cooperation is weighed against the

³² Letter from the Minister of Defence to the CTIVD, dated 8 April 2016 (response to the review reports nos. 48 and 49).

³³ The CTIVD's understanding is that the ministry needed time to study the weighting notes thoroughly before granting authorization to continue the cooperative relationships.

assessment of the cooperation criteria and any specific risks of the cooperation. This section expressly focuses on the risk of contributing to illegal targeting. The weighting shows whether cooperation is permissible or whether certain restrictions apply. The weighting note is concluded with an advisory opinion on whether or not to continue cooperation and in general terms how this should be done (for example: expand the cooperation).

The MIVD concludes for all sigint cooperation partners, except one, that the cooperation can be continued and that all cooperation criteria have been met. As a result, no restrictions apply to the cooperation and all forms of cooperation are permitted on the condition that authorization is granted at the correct level. Certain risks are sometimes identified that require setting conditions for providing information. One example is the condition that the data provided may only be used for intelligence purposes unless the MIVD authorizes a different purpose (a disclaimer). This is done in the case of a close relationship between the foreign service and the criminal investigation services of the country in question, to prevent data unintentionally being used for criminal investigation or prosecution. The CTIVD understands that these risks do not lead to a moderate or insufficient score on the cooperation criteria if it concerns a cooperation partner who has been assessed as reliable.

One of the sigint cooperation partners shows a different picture than the one described above. The criteria (b) respect for human rights and (e) level of data protection are assessed as moderate for this service. That means that there are risks in cooperating in those areas. The outcome of the weighting is that cooperation is possible, with due observance of a number of conditions and areas of concern. Additional conditions apply for the provision of personal data and of data that could be used for targeting. Two points are mentioned where greater vigilance is required in the cooperation.

The CTIVD established that the MIVD weighting notes relating to the sigint cooperation partners contain a clear weighting. The current cooperative relationship and the importance of continuing that relationship are clearly described and sufficient attention is paid to the risks and the implications of that cooperation. The assessment of the cooperation criteria is generally also substantiated sufficiently. However, there is one structural deficiency and several incidental deficiencies. Regarding six weighting notes, the CTIVD concludes for criterion (e) level of data protection and in one of the weighting notes also on criterion (d) legal powers and possibilities that the content cannot support the conclusions. This is unlawful. The CTIVD is of the opinion that all weighting notes need to be supplemented if they are to give an adequate picture of the risks of cooperation and that there should be more consistency when weighing the risk of the cooperation contributing to illegal targeting. The deficiencies that appear from the investigation are discussed further in Appendix II to this report. In her response of 17 December 2018 to the review report, the Minister of Defence indicated that the weighting notes have been or would be adjusted in line with the CTIVD's recommendations.

The same applies to the MIVD as remarked above for the AIVD (see Section 2.4): the weighting notes are produced under a certain level of work pressure. However, that pressure is not as great as that of the AIVD because of the fact that the MIVD began drafting the weighting notes³⁴ in advance and because the MIVD has fewer cooperative relationships to weigh.

³⁴ For the assessment of the seventeen previously drafted weighting notes, see the CTIVD review report no. 48 on the implementation of the cooperation criteria by the AIVD and the MIVD. Investigation into the execution of Dutch House of Representatives motion no. 89 (by members Schouw and Segers), *Parliamentary Documents II* 2015/16, 29 924, no. 142 (appendix), accessible on www.ctivd.nl.

4. Conclusions

In this chapter the CTIVD answers the two questions that are key to this investigation:

I. Did the Minister of the Interior and Kingdom Relations and the Minister of Defence fulfil their pledge that the weighting notes for the lead group of trusted partners would be complete by 1 May 2018?

The answer to this is short and simple: yes, all weighting notes for the CTG and the foreign services with which close sigint cooperative relationships are maintained were established by the heads of service before 1 May 2018.

The authorization to continue the AIVD's cooperative relationships was granted before 1 May 2018 by the DG-AIVD, who has been authorized on a structural basis following a mandate decision of the Minister of the Interior and Kingdom Relations where it concerns low-risk services. According to the CTIVD, this interpretation of the mandate is contrary to the intention of the legislature in a substantive sense. Indeed, the explanatory memorandum explicitly speaks out against the distinction between high-risk service and low-risk service as an interpretation of the mandate. In addition, prior ministerial authorization thus becomes the exception and not the rule, where it concerns the AIVD's cooperative relationships. This, too, is a situation that deviates from what is described in the explanatory memorandum. The low-risk category does not only comprise the majority of the cooperative relationships of the AIVD, but also the lead group of the services discussed in this investigation. From the perspective of the far-reaching forms of cooperation that take place and the intensive nature of the data exchange, including the structural exchange of unevaluated data, it is precisely these cooperative relationships that demand authorization at the highest political level and from outside the AIVD. The CTIVD therefore views the lack of ministerial authorization to continue the cooperative relationships with the CTG and sigint cooperation partners as undesirable.

The Minister of Defence only granted authorization on 16 June 2018 for the continuation of the MIVD's cooperative relationships with sigint cooperation partners. That means that there was no authorization to continue these cooperative relationships at the appropriate level for a period of six weeks. Therefore the situation was unlawful for a period of time.

II. Do the established weighting notes comply with the ISS Act 2017?

To answer this question, the CTIVD reviewed the established weighting notes of both services against the provisions of Section 88 of the ISS Act 2017 and what could be derived from the explanatory memorandum and parliamentary debate on the requirements that apply to the content of the weighting notes (see Appendix I for the Assessment Framework).

AIVD weighting notes

In this investigation, the CTIVD reviewed over 40 weighting notes³⁵ of the AIVD. These weighting notes show structural and incidental deficiencies, as a result of which they fail to comply in some respects with the requirements set by the ISS Act 2017. In 24 weighting notes, the assessment of one or more cooperation criteria was insufficiently substantiated. In addition, one of the other weighting

³⁵ It is not possible to list the exact number, as the number of sigint cooperative partners is state secret. 'Over 40' relates to the 29 CTG partner services and a number of sigint cooperative partners.

notes failed to report and weigh information that should have led to a negative assessment of the professionalism and reliability criterion.

The CTIVD assesses the flaws it reports below as unlawful. This assessment does not, however, mean that the cooperation that takes place based on that weighting note is by definition unlawful, because there may be compelling operational reasons for the cooperation. It does mean that a sound legal basis for that cooperation is lacking.

- In its procedure, the AIVD distinguishes between the cooperation criteria referred to in the Act. Failure to comply with criteria (d) legal powers and possibilities and (e) level of data protection do not, according to that procedure, result in the conclusion high-risk service while that is the case for the other legal criteria. In one of the weighting notes this resulted in both criteria (d) and (e) being assessed as insufficient while this service was nevertheless designated as low-risk service, without substantive grounds. The CTIVD finds that a full weighting failed to take place of the legal criteria (d) and (e). Additional safeguards for the cooperation are also lacking as a result. (Section 2.3)
- The AIVD weighting notes lack explicit substantive weighting. The weighting notes make no mention anywhere of a rationale for why the importance of the cooperation outweighs the risks that are listed. The weighting notes also fail to explain how this weighting is translated into the authorized content of the cooperation. (Section 2.4)
- In its weighting notes, the AIVD in principle does not mention the preconditions for cooperation. It is therefore unclear from the weighting notes to what extent the mentioned risks can be mitigated and specifically how that will be done. That makes any weighting difficult because in many cases it is unknown if the established risks can be mitigated. (Section 2.4)
- The cooperation criterion (e) level of data protection was insufficiently addressed. All weighting notes need to be supplemented if they are to provide an adequate picture of the risks in this context. The CTIVD concludes that in sixteen weighting notes the information about safeguards that apply in the area of data protection is so meagre that the content does not support the positive conclusions drawn by the AIVD. (Appendix II, Section 1.1)
- The weighting notes do not provide a correct interpretation of the cooperation criterion (d) legal powers and possibilities. In many cases there is no explanation of the safeguards that apply to the collection of data by the foreign service. As a result, it is unclear to what extent there is a risk that this service is authorized to collect data in a way that is unacceptable according to Dutch legal standards. Twelve weighting notes failed to adequately substantiate the conclusion that this criterion had been met. Moreover, all weighting notes lack an assessment of the foreign service's transparency.³⁶ (Appendix II, Section 1.2)
- In its weighting notes, the AIVD does not sufficiently address the risk that cooperation could contribute to illegal targeting. In twelve weighting notes this topic is not even mentioned. The CTIVD established that the AIVD failed to comply with its undertaking³⁷ to address in its weighting notes the possibility that information could play a role in a targeting process. In the majority of the other weighting notes any substantiation for the conclusion that there is no risk is lacking. (Appendix II, Section 1.3)

³⁶ When transparency is referred to in this report, it refers to the level of required information about the foreign service that was publicly available and, where relevant, to what extent the foreign service was willing to provide this information.

³⁷ Letter from the DG-AIVD to the CTIVD about review report no. 50 dated 19 May 2017.

- In the CTIVD's opinion, three weighting notes failed to adequately substantiate the conclusion that the democratic anchorage cooperation criterion has been met. It established that the weighting note in these cases paints a negative picture of the democratic safeguards that apply to the service's conduct, which makes the positive assessment incomprehensible. (Appendix II, Section 1.4)
- One of the weighting notes lacks information that should have led to a negative assessment of the professionalism and reliability criterion. That information had already been known to the AIVD for some time when the weighting note was established. What is more, a redacted version of the weighting note in question has not been approved up to the time this report was drafted. The CTIVD established that in this case the DG-AIVD failed in his legal duty of care to reassess the cooperation if circumstances gave rise to do so. (Appendix II, Section 1.5)

MIVD weighting notes

For this investigation, the CTIVD reviewed over ten³⁸ of the MIVD weighting notes. These notes provide a transparent weighting in which sufficient attention is paid to the importance of the cooperation, the risks and the implications. The assessment of the cooperation criteria is generally also substantiated sufficiently. However, all the weighting notes require some additions if they are to provide a clear view of the risks of the cooperation. They contain one structural deficiency and several incidental deficiencies. In six of the weighting notes the assessment of the level of data protection was insufficiently substantiated, and in one of these weighting notes this was also the case for the criterion legal powers and possibilities. These cases therefore failed to comply with the requirements of the ISS Act 2017.

The CTIVD assesses the deficiencies it reports below as unlawful with the exception of the deficiencies that relate to the assessment of the risk of contributing to illegal targeting, which did not lead to unlawful conduct.

- The MIVD weighting notes structurally fall short in the area of cooperation criterion (e) level of data protection. Information security and retention periods were the only aspects focused on, while information on other safeguards is lacking. In six cases the conclusion that this criterion had been met was not adequately substantiated. (Appendix II, Section 2.1)
- The MIVD is not consistent in its assessment of the risk of contributing to illegal targeting in its weighting notes concerning the services that belong to states regarding which there are indications that they do or did not keep to international standards concerning the use of force. In one case that leads to a score of moderate on the human rights cooperation criterion, while in the other case that criterion is marked as sufficient. One weighting note fails to mention that publicly accessible information has shown that international standards were violated in the use of force. This is a relevant factor for the weighting. The CTIVD cannot rule out that this information would have resulted in a different assessment of the human rights criterion. (Appendix II, Section 2.2)
- One of the MIVD's weighting notes provides too little insight into the safeguards that apply to the use of powers by the foreign service in question. As a result, the content does not support the conclusion that the legal powers and possibilities cooperation criterion had been met. All MIVD weighting notes lack an explicit assessment of the level of transparency of the service in question.³⁹ (Appendix II, Section 2.3)

³⁸ It is not possible to list the exact number as the number of sigint cooperative partners is state secret.

³⁹ When transparency is referred to in this report, it refers to the level of required information about the foreign service that was publicly available and, where relevant, to what extent the foreign service was willing to provide this information.

5. Recommendations

In this report, the CTIVD has established that the AIVD and MIVD weighting notes for the lead group of foreign services show structural and incidental deficiencies. In addition, where the AIVD is concerned, there were deficiencies that related to the authorization level for entering into cooperative relationships and the procedure when weighing the cooperation criteria. The following recommendations are aimed at repairing the established shortcomings as soon as possible and providing specific guidelines to make structural improvements. In this respect, the CTIVD also refers to its advisory opinions in appendix III to the report regarding the process of drawing up the weighting notes.

In her response of 17 December 2018 to the review report, the Minister of Defence indicated that all the recommendations for the MIVD would be implemented. The response by the Minister of the Interior and Kingdom Relations to the recommendations for the AIVD will be provided below where relevant.

Recommendations for both services

1. The CTIVD recommends providing an assessment of the foreign service's transparency. This includes indicating to what degree the required information about the foreign service was publicly available and, where relevant, to what extent the foreign service was willing to provide this information. That information could be about legal powers and the safeguards that apply to their use, about technical possibilities (where necessary), about democratic anchorage, about the oversight of the service in question and about the safeguards in the area of data protection. Transparency between the intelligence and security services cannot be maximal, but it should be possible to compare the powers and safeguards between the cooperating services in broad outlines, in accordance with the European case law.
2. For the assessment of the level of data protection, the CTIVD recommends paying attention (in broad outline) to the eight main types of safeguard: (1) purpose limitation, (2) data minimization, (3) retention periods, (4) safeguards relating to the quality of data, (5) safeguards that relate to the security of data against loss or unauthorized access, use, change or destruction, (6) observing the interests of individuals involved (proportionality), (7) observing the rights of the individuals involved (for example access to data) and (8) independent, adequate and effective review of data protection. It is important that these safeguards are related where possible to the data that the AIVD or the MIVD provide to a foreign service. That means assessing to what extent these safeguards apply to the data that the foreign service receives from its partner services and to what extent these safeguards also apply to the data of non-residents of the country in question. This leads to three action points:
 - I. Supplement the substantiation of the weighting notes that are deficient in that respect and reassess the criterion. It is essential that this is done in the short term.
 - II. Supplement the other weighting notes of the CTG and sigint partner services along the lines set out above.
 - III. Amend the internal procedure so that the eight types of safeguard are addressed in criterion (e) level of data protection.

In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations indicated that the level of data protection would be reassessed based on the above eight safeguards.

3. The CTIVD established that the weighting notes used by the AIVD and the MIVD contain disparities for the same partner services in terms of underlying factual information. In one case, the conclusions differ as well. The CTIVD is of the opinion that these discrepancies between the weighting notes should not exist and therefore recommends that the AIVD and the MIVD should exchange the information that is relevant to identifying the risks and should align their conclusions where it concerns a partner service with which both services cooperate. With the exception of the assessment of professionalism and reliability, the conclusions relating to the cooperation criteria should be identical. (See appendix III, Section 3 on this topic)

In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations indicated she would strive for similar outcomes of the assessment of legal cooperation criteria by the AIVD and the MIVD.

4. The CTIVD found that the AIVD and the MIVD did not determine which weighting notes (AIVD or MIVD weighting notes) would be used by the joint units of the services, where it concerns cooperation with a foreign service with which both services cooperate. It recommends detailing this further in policy. (See appendix III, Section 3 on this topic)
5. Cooperation in multilateral cooperative partnerships has a dynamic of its own. It is not always possible for the AIVD and the MIVD to set unilateral conditions to the cooperation with one of the foreign partner services while this could be necessary to mitigate any risks established. For that reason, the CTIVD considers it necessary that the AIVD and the MIVD draw up a joint plan to mitigate risks if there are indications that one of the partners in multilateral cooperative partnerships presents an increased risk. (See appendix III, Section 3 on this topic)

Recommendations for the AIVD

6. In the AIVD Mandate Decision regarding cooperation with foreign intelligence and security services 2018, the Minister of the Interior and Kingdom Relations mandates her power to grant authorization to enter into cooperative relationships with low-risk services to the DG-AIVD. In the opinion of the CTIVD, this decision is not in line with the intention of the legislature and therefore in contravention with the legislature in a substantive sense. If the Minister of the Interior and Kingdom Relations chooses to use the option offered under the ISS Act 2017 to mandate her power, the CTIVD recommends giving a different interpretation than the current mandate decision. In any case it is not right that the intensive cooperative relationships with the lead group of the cooperative partners - with which unevaluated data is exchanged among other things - are authorized at the level of the DG-AIVD on a structural basis.

In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations indicated she would amend the interpretation given to the mandate. It is as yet not entirely clear to the CTIVD how the mandate decision will be amended.

7. The CTIVD recommends rectifying the deficiencies in the weighting notes of the CTG and sigint cooperative partner services and submitting them to the Minister of the Interior and Kingdom Relations with the request to grant authorization to continue the cooperative relationships.
8. A further recommendation is to drop the distinction that is made between the weighting of on the one hand the cooperation criteria (a) democratic anchorage, (b) human rights and (c) professionalism and reliability and on the other hand the cooperation criteria (d) legal powers and possibilities and (e) level of data protection. All legal cooperation criteria should be given full weighting and should potentially lead to the conclusion of high-risk service with the corresponding additional safeguards. In practice this means that policy and procedure must be adjusted accordingly.

In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations stated that if in future the criteria “legal powers” and “level of data protection provided” are marked as insufficient, the outcome should be “high-risk service”.

9. To ensure compliance with the ISS Act 2017, the CTIVD recommends including an explicit substantiated weighting in each weighting note in which the importance of the cooperation is weighed against the possible risks. In addition, the weighting note must include which mitigating measures are being taken to limit the established risks. Further fine-tuning and additional measures can be addressed at the time of the specific cooperation activities.
10. The CTIVD recommends basing the assessment of the criterion (d) legal powers and possibilities on an overview of the legal powers of the service in question, the safeguards against unjustified interference with fundamental rights that apply to the use of those powers and the extent to which these apply to non-residents of the country in question. The technical possibilities must be addressed if the AIVD has indications that these are not aligned with the legal powers (beyond what is necessary) or that these are otherwise unacceptable according to Dutch legal standards. That gives rise to the following action points:
 - I. Supplement the substantiation of the weighting notes that are deficient in that respect and reassess the criterion. It is essential that this is done in the short term.
 - II. Supplement the other weighting notes of the CTG and sigint partner services along the lines set out above.
 - III. Amend the internal procedure so that in future this criterion is addressed in the manner specified above.

In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations indicated she would reassess the legal powers and possibilities.

11. It is important that all weighting notes substantiate to what extent there is a risk of the cooperation contributing to illegal targeting. For this substantiation, the CTIVD recommends in any case discussing the state’s involvement in use of force in the context of an armed conflict or military mission and on any indications that the state failed to keep to international standards in this use of force as this emerges from reliable information from open sources, among other things. If a risk exists, this should be weighed in the assessment of the human rights criterion. It is important to see whether further preconditions could be set to mitigate the risk. The following steps are required:
 - I. Supplement those weighting notes of the CTG and sigint partner services which lack a substantiation of this risk, and reassess the human rights criterion where necessary. It is essential that this is done in the short term.
 - II. Amend the internal procedure so that in future the risk of contributing to illegal targeting is adequately addressed in the weighting notes.

In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations indicated that the weighting notes have been or would be reviewed and where necessary the risk of illegal targeting addressed.

12. The CTIVD recommends supplementing the substantiation of the criterion (a) democratic anchorage in three weighting notes, either by more information on the existing democratic safeguards or by a better substantiation of the positive assessment (or both). Should this not prove possible, the assessment must be changed to ‘insufficient’. It is essential that this is done in the short term.

13. One of the weighting notes must be supplemented with information in the area of professionalism and reliability which is now lacking according to the latest state of affairs. This criterion must be reassessed. The CTIVD recommends submitting the amended weighting note to the Minister of the Interior and Kingdom Relations so that she can see if this provides sufficient grounds for the continuation and the content of the cooperation. It essential that this is done immediately.


In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations indicated that the weighting note in question has been reviewed.

Recommendations for the MIVD

14. The CTIVD recommends that the MIVD reports in one of its weighting notes the indications from publicly available information that point to the violation of international standards in the use of force. The weighting note must subsequently be reassessed on this point. It essential that this is done in the short term.

15. A further recommendation is that in one of its weighting notes the MIVD details the safeguards that apply to the use of legal powers by the foreign service in question and assesses to what extent any failing in this area impacts the cooperative relationship. It essential that this is done in the short term.

In her response of 17 December 2018 to the review report, the Minister of the Interior and Kingdom Relations indicated that the weighting notes in question has been reassessed and amended in line with the above recommendations.



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