

Appendix II: Investigation plan and methodology

To the review report about the use of cable
interception by the AIVD and the MIVD

The snapshot phase

CTIVD no. 75

Adopted on 26 January 2022



Review Committee
on the Intelligence and
Security Services

CTIVD no. 75

APPENDIX II: INVESTIGATION PLAN AND METHODOLOGY

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1. Introduction

This appendix is part of the report about the use of investigation-related interception by the General Intelligence and Security Service (AIVD) and the Military Intelligence and Security Service (MIVD). The report answers the following question: in the period from 1 May 2018 to 31 March 2021, did the AIVD and the MIVD (hereinafter: the services) lawfully operationalise an access location and lawfully exercise the cable interception in the snapshot phase? The services operationalised a so-called access location and a limited form of (the power of) cable interception. The latter is referred to as 'snapshotting'. It involves the creation of short snapshots to facilitate the investigation of cable communication. In the investigation period, the Joint Sigint Cyber Unit (JSCU), a combined technical unit of the AIVD and the MIVD, was responsible for operationalisation and snapshotting activities. As such, the findings and lawfulness decisions apply to both the AIVD and the MIVD for the purpose of the CTIVD assessment.

In this appendix, the CTIVD explains the investigation plan and methodology of the investigation about the use of cable interception by the AIVD and the MIVD.

Investigative question

In the investigation period, the CTIVD investigated the following investigative question:

In the period from 1 May 2018 to 31 March 2021, did the AIVD and the MIVD lawfully operationalise an access location and lawfully exercise the cable interception in the snapshot phase?

Scope of the investigation

The lawfulness investigation of the CTIVD and, as such, the investigative question, focused on the investigation period above. However, the CTIVD also included the period before the introduction of the Wiv 2017 in interviews and the file search in order to gain a clear picture of the (run-up to) the exercising of cable interception. This period is briefly set out in chapter 3 of the review report. The lawfulness investigation focused on compliance with the legal requirements that the Wiv 2017 imposes on the exercising of cable interception and other (special) investigatory powers used in this context. The requests for authorisation, approved by the relevant Ministers, followed by the Investigatory Powers Commission (TIB), were also an important part of the assessment framework that the CTIVD used.

The requests for authorisation to use the power to intercept cable-bound communication contains further agreements that, as such, became conditions for the lawful use of this power. Therefore, the CTIVD investigation, including the technical investigation, focused on compliance with the legal requirements and also on compliance with the agreements in the requests. The CTIVD did not assess the lawfulness of the reasoning of the requests for authorisation again because the TIB had already done this assessment. However, the CTIVD did report about the specificity requirement because the Minister of the Interior and Kingdom Relations (BZK) and the Minister of Defence had asked it to do this.¹ In addition to the assessment of lawfulness, the CTIVD wants to use this report to contribute to debate about cable interception and the forthcoming amendment of the Act by being transparent about the practices of the services - as much as possible given the State secret nature of their work.

During its investigation, the CTIVD observed that the Act, the interpretation of the Act and its implementation in practice were not entirely consistent on a number of points. This has consequences for the exercising of cable interception. With this in mind, the report contains not just an assessment of the conduct of the services but also a description of the bottlenecks observed.

Course of the investigation

The present review report was drafted on 17 November 2021, after which the Ministers of BZK and Defence were given the opportunity to respond to the findings in it. The responses of the Ministers to the findings were received on 18 January 2022 and led to several amendments and clarifications. The review report was adopted on 26 January 2022.

At the end of August 2021, the CTIVD shared the findings of its investigation with both directors in light of their specific responsibilities for the duty of care. Further to the above, the measures the services have taken and are going to take to mitigate the unlawful conduct observed and also the risks were discussed in more detail with them.

Progress reports

It should be noted that the period to which the CTIVD investigation relates starts with the introduction of the Wiv 2017 on 1 May 2018 and ends approximately three years later. This means there is some overlap with the period that the CTIVD included in its progress reports about implementation of the Wiv 2017: 1 May 2018 to 1 May 2020 inclusive.² In these reports, the CTIVD initially observed high risks of unlawful conduct by the services. Over time, the efforts of the AIVD and the MIVD resulted in a reduction of these risks. In its fourth and final progress report, the CTIVD concluded that the Wiv 2017 has not been implemented in full yet despite the great deal of work the services have done. Further attention is particularly necessary for the translation of policy and process descriptions into their implementation in practice.

¹ Letter to the President of the Senate dated 6 April 2018, *Parliamentary papers I* 2017/18, 34588, G.

² Progress reports I to IV inclusive, available on ctivd.nl.

2. Investigation

The CTIVD drafted a legal assessment framework to assess policy and/or working instructions and the practices of both services.³ This section describes the investigation in which the CTIVD gathered information about the policy, working instructions and practices of the AIVD and the MIVD.

File search

When drafting the legal framework, the CTIVD familiarised itself with current legislation and regulations laid down in the Wiv 2017. It also considered legislative history and recent European case law about cable interception. Before conducting later interviews, the CTIVD extensively investigated the systems of both services. The CTIVD consulted relevant policy documents and other types of documents. The CTIVD did not always have prior authorisation to investigate certain systems or folders and had to request this authorisation during the course of its investigation. In certain cases, it took a disproportionate amount of time to obtain these authorisations.

Interviews

The CTIVD organised a number of informal interviews prior to and during its investigation. The object of these interviews was to gain knowledge about cable interception and also about the technical chain the services use to store and further process intercepted data. Cable interception and the corresponding technical chain are complex subjects that the CTIVD has had to familiarise itself with in a short space of time. Thanks in part to the informal interviews it organised, the CTIVD obtained the knowledge it needed to gain a full picture of this power and the process the services followed, from authorisation to actual interception.

During its investigation, the CTIVD organised formal interviews with lawyers, policy officers, supervisors and operational employees from both services. These interviews focused on the conduct of the services and on the work process of the services in the investigation period. The CTIVD also used them to verify investigation results, including technical findings.

As also described in the introduction, the CTIVD shared the findings of its investigation with both heads of service at the end of August 2021 in light of their specific responsibilities for the duty of care. The services then drafted an improvement plan, which is described in detail in chapter 4 of the review report.

Written questions

In addition to the interviews, the CTIVD presented both services with a number of written questions. In most cases, the CTIVD received the answers to these questions on time.

Technical investigation

A technical investigator from the CTIVD was structurally involved in the lawfulness investigation. The technical investigation focused on verifying compliance with a number of conditions for the lawful exercising of cable interception, as discussed in chapter 6 of the review report.

This started, firstly, with the automated logging of various systems. Logging spanned the entire investigation period and clarifies how employees of the services obtained the intercepted data.

³ The assessment framework has been included in Appendix I of the review report.

The services generate this logging with information security in mind, not *compliance*. As such, logging is not designed to answer the question of the extent to which data processing has been done lawfully. However, the CTIVD was still able to use the logging for the technical investigation.

Secondly, an investigation was done into the processing of intercepted data. It utilised the data that the service had generated about data that had been intercepted and stored. For example, the *labelling* (and other metadata) of these data on the data cluster of the services.

Thirdly, the (source) code of applications and configuration files were utilised. This usually happened in addition to automated logging. In cases where logging was absent, the source codes and configuration files were used as independent sources.

The CTIVD did full analyses of the data and also applied random sampling. Finally, the investigators organised both formal and informal interviews with employees of the services and written questions were asked about the findings of the analysis in order to verify and identify the findings of the technical investigation.

Revision

During the investigation, the findings obtained, and the considerations made were twice submitted to a number of members of the knowledge network of the CTIVD. Internal critical input was also obtained within the CTIVD.

TIB

Before drafting the report, a meeting was organised with the representatives of the Investigatory Powers Commission (TIB) about the findings of the CTIVD and the interpretation of the legal framework applicable to cable interception.

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

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