

# Short Thematic Report

## National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies

Legal update

Country: The Netherlands

Version of 29 June 2016

FRANET contractor: Art.1, Dutch knowledge centre on discrimination

Author(s) name(s): Jacky Nieuwboer

Reviewed by: Gerrit-Jan Zwenne

DISCLAIMER: This document was commissioned under a specific contract as background material for the project on [National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies](#). The information and views contained in the document do not necessarily reflect the views or the official position of the EU Agency for Fundamental Rights. The document is made publicly available for transparency and information purposes only and does not constitute legal advice or legal opinion.

# 1 Description of tasks – Phase 3 legal update

## 1.1 Summary

Civil surveillance in the Netherlands is conducted by the AIVD. A joint effort of the AIVD with its military counterpart is the Joint Sigint Cyber Unit, established on 15 June 2014. The aim of the unit is to specifically combat cyberthreats.<sup>1</sup> At the start of 2016, the legal situation in the field of surveillance in the Netherlands is generally still the same as by the end of September 2014. In the following, the following major change will be described: the establishment of a temporary, independent commission that gives binding advice to ministers when they want to approve tapping lawyers and journalists by the General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst*, hereinafter: AIVD) or its military counterpart, the Military Intelligence and Security Service (*Militaire Inlichtingen- en Veiligheidsdienst*, hereinafter: MIVD). This commission was necessary due to a judgement by the European Court of Human Rights and subsequent judgements by Dutch courts. Future changes in the field of the intelligence and security services are, furthermore, addressed in a bill, which has not been discussed by parliament yet.

In the present situation, the AIVD cannot conduct mass cable surveillance. The bill is designed to change this situation, based on the need to combat terrorism and fight terrorist attacks. In the bill, the minister oversees these activities, instead of an independent body that can take binding decisions. It is felt that the bill should be changed in this respect, but the Council of State still has to give its opinion. The bill does introduce independent, binding decisions by the Review Committee on the Intelligence and Security Services (*Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten*) in the case of individual complaints. This Committee is already a supervisory body in the case of intelligence and security services, although it cannot make binding decisions. It is questionable whether it should combine its supervisory tasks and its tasks in the case of complaints, due to a possible conflict of interests.

The above shows that the government is making some moves towards more powers for independent bodies, but, especially in the case of mass surveillance, according to the key players in the field it does not go far enough yet. This may be different when the bill has been amended on the basis of reactions.

### 1.1.1 Mass cable surveillance

The AIVD, including the Joint Sigint Cyber Unit, is still prohibited from conducting mass cable surveillance. Telecommunication interceptions of communication that is cable-bound (telephone and internet, glassfiber cables) must be targeted and requires prior ministerial approval.<sup>2</sup> It is assumed that legislation in this field applies to interceptions abroad as well.<sup>3</sup>

2

<sup>1</sup> European Parliament, DG for Internal Policies (2013), National Programmes for mass surveillance of personal data in EU Member States and their compatibility with EU Law, PE 493.032, Brussels, October 2013; [www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493032/IPOL-LIBE\\_ET\(2013\)493032\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493032/IPOL-LIBE_ET(2013)493032_EN.pdf), pp. 73-76; Netherlands, Minister of the Interior and Kingdom Relations & Minister of Defence (*Minister van Binnenlandse Zaken en Koninkrijksrelaties & Minister van Defensie*) (2014), Letter to the House of Representatives (*Tweede Kamer der Staten-Generaal*), no. BS2014018110, 3 July 2014, available at: [www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/07/03/kamerbrief-over-convenant-joint-sigint-cyber-unit-jscu.html](http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/07/03/kamerbrief-over-convenant-joint-sigint-cyber-unit-jscu.html)

<sup>2</sup> Netherlands, Intelligence and Security Services Act 2002 (*Wet op de Inlichtingen- en veiligheidsdiensten 2002*), Article 25, paragraphs 1-6, available at: <http://wetten.overheid.nl/jci1.3:c:BWBR0013409&hoofdstuk=3&paragraaf=3.2&sub-paragraaf=3.2.2&artikel=26&z=2013-01-01&g=2013-01-01>

<sup>3</sup> E-mail correspondence with the Review Committee on the Intelligence and Security Services (CTIVD), 4 September 2014. ; Netherlands, Ministry of the Interior and Kingdom Relations (*Ministerie van Binnenlandse Zaken*

The AIVD is allowed to conduct surveillance focusing on non-cable bound communication (satellite and radio traffic) without limits regarding prior approval or geographical limitations. When the service applies specifics, e.g. an address, or uses keywords in its search, it does need ministerial approval.<sup>4</sup>

Based on a report by an ad hoc committee assessing the activities of the intelligence and security services in 2013 a bill was drafted. The bill introduces the following changes: it states that the intelligence and security services should receive the power to intercept untargeted, cable-bound communication, in order, among other things, to combat terrorism and to fight cyber attacks. At the same time, ministerial approval should accompany every step of the new surveillance process. Therefore, ministerial authorisation is retained in the new situation. There is no supervision by an independent third party which can take binding decisions. However, the opinions of the Review Committee on the Intelligence and Security Services (*Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten*), the expert body that supervises the intelligence services at present, will receive more weight. If this Committee views the decision of the Minister of the Interior as unlawful, the Minister has to reconsider this decision. Moreover, the Review Committee will be able to apply an individual complaints procedure, which does not exist at present. When complaints are filed and the Review Committee takes a decision, this decision will be binding.<sup>5</sup>

The bill, which introduces the changes described above, was supposed to be ready for internet consultation, the first stage of the legislative process, by the end of 2014 in order to become effective by 1 July 2016 at the latest.<sup>6</sup> However, internet consultation did not start until 2 July 2015. 557 reactions have been made public in the meantime, mainly from individuals.<sup>7</sup> One of the key players, the Review Committee for the Intelligence and Security Services (*Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten*) made its reaction public on 3 September 2015. It reacted in particular to the fact that the option of a binding decision by the CTIVD would only be available for complaints and that the right to authorize the use of the most intrusive investigatory powers would, in principle, be exclusively retained by the minister. It also reacted to the fact that binding independent oversight of the exercise of investigatory powers – prior or retrospective – was not deemed to be necessary. In its response to the draft

3

*en Koninkrijksrelaties*) (2014), Voorgenomen en aanhangige wetsvoorstellen die (mede) betrekking hebben op Caribisch Nederland (overzicht juli 2014), The Hague, Ministry of the Interior and Kingdom Relations, available at: [www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/07/04/bes-wetgeving-in-voorbereiding-rijksbreed/voorgenomen-en-aanhangige-wetsvoorstellen-bes-wetgeving-voor-caribisch-nederland-overzicht-juli-2014.pdf](http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/07/04/bes-wetgeving-in-voorbereiding-rijksbreed/voorgenomen-en-aanhangige-wetsvoorstellen-bes-wetgeving-voor-caribisch-nederland-overzicht-juli-2014.pdf).

<sup>4</sup> Netherlands, Intelligence and Security Services Act 2002 (*Wet op de Inlichtingen- en veiligheidsdiensten 2002*), Article 26, paragraphs 1-5, available at:

<http://wetten.overheid.nl/jci1.3:c:BWBR0013409&hoofdstuk=3&paragraaf=3.2&sub-paragraaf=3.2.2&artikel=26&z=2013-01-01&g=2013-01-01>

<sup>5</sup>Netherlands, Minister of the Interior and Kingdom Relations & Minister of Defence (*Minister van Binnenlandse Zaken en Koninkrijksrelaties & Minister van Defensie*) (2014), 'Betreft Kabinetsstandpunt herziening interceptiestelsel Wiv 2002', Letter to the House of Representatives (*Tweede Kamer der Staten-Generaal*), 21 November 2014, available at

<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2014/11/21/kabinetsstandpunt-herziening-interceptiestelsel-wiv-2002/kabinetsstandpunt-herziening-interceptiestelsel-wiv-2002.pdf> ;

Netherlands, Minister of the Interior and Kingdom Relations & Minister of Defence (Minister van Binnenlandse Zaken en Koninkrijksrelaties & Minister van Defensie) (2015), 'Wet op de inlichtingen- en veiligheidsdiensten in consultatie', News release 2 July 2015, available at: <https://www.rijksoverheid.nl/actueel/nieuws/2015/07/02/wet-op-de-inlichtingen-en-veiligheidsdiensten-in-consultatie>

<sup>6</sup> E-mail correspondence with the Review Committee on the Intelligence and Security Services (CTIVD), 4 September 2014. Netherlands, Ministry of the Interior and Kingdom Relations (*Ministerie van Binnenlandse Zaken en Koninkrijksrelaties*) (2014), Voorgenomen en aanhangige wetsvoorstellen die (mede) betrekking hebben op Caribisch Nederland (overzicht juli 2014), The Hague, Ministry of the Interior and Kingdom Relations, available at: [www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/07/04/bes-wetgeving-in-voorbereiding-rijksbreed/voorgenomen-en-aanhangige-wetsvoorstellen-bes-wetgeving-voor-caribisch-nederland-overzicht-juli-2014.pdf](http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/07/04/bes-wetgeving-in-voorbereiding-rijksbreed/voorgenomen-en-aanhangige-wetsvoorstellen-bes-wetgeving-voor-caribisch-nederland-overzicht-juli-2014.pdf)

<sup>7</sup> The Netherlands, Government (*Overheid*) (2016), 'Consultatie; Wet op de inlichtingen- en veiligheidsdiensten 20..; Reacties op de consultatie', available at: <https://www.internetconsultatie.nl/wiv/reacties/datum/56>

bill, the Committee indicated that, given European case law and human rights standards, the suggested system provided inadequate guarantees. In order to offer these guarantees, an independent body must have the power to prevent or halt unlawful activities. The Committee suggested strengthening the oversight with a binding, direct check in relation to the minister's authorisation. There are other options too, such as accommodating the authorisation of the use of investigatory powers within a judiciary institute or another independent body. Whichever approach is chosen, is the Committee considers it important that the system as a whole fulfils European legal norms. According to the Committee this means that, somewhere in the system, there must be the option for an independent body to intervene in a binding manner and provide a substantive assessment of the use of investigatory powers.<sup>8</sup>

The National Ombudsman reacted in a letter on 26 August 2016. He also stated that there should be supervision by an independent third party, which should issue binding decisions, such as the CTIVD. This party, however, should not deal with complaints at the same time. A body such as the National Ombudsman should do this, to make clear that there is no conflict of interests.<sup>9</sup>

The government states that the bill has been amended based on the reactions and that the amended version of the bill was sent for consultation to the Council of State. Once the Council of State has given its advice the bill with its amendments will be introduced in Parliament and all information will be made public before summer.<sup>10</sup> No future date of enactment is mentioned.

On the whole, it is clear that an independent oversight body that can give binding decisions is considered lacking at the moment, and that it is felt that there is an actual need for it.

## 1.1.2 Oversight

A important oversight body is the Review Committee on the Intelligence and Security Services (*Commissie van Toezicht betreffende de Inlichtingen- en Veiligheidsdiensten, CTIVD*), an independent body with legal basis in Article 64 of the Intelligence and Security Service Act. It consists of three members, proposed by the Ministers involved and appointed by Royal Decree.<sup>11</sup> The Ministers involved, the heads of the services, their coordinator and everyone who is involved in the execution of the Intelligence and Security Services Act have to provide all requested information and further cooperation to this committee. The CTIVD has access to all available information. It has the power to carry out investigations. It then writes a supervisory report. This report is public, except for information about means used by the services in specific matters, secret sources and the current level of the services. Recommendations may be made to the Minister involved.<sup>12</sup> The CTIVD cannot issue binding decisions.

In 2015, the CTIVD published four review reports, two of which referred to the General Intelligence and Security Services. These reports focused on the crash of flight MH17 (report no. 43) and about possible accomplices to convicted terrorist Mohammed B. (report no. 45).

4

<sup>8</sup> CTIVD (2015), 'Reactie CTIVD op het concept-wetsvoorstel Wet op de inlichtingen- en veiligheidsdiensten 20XX', The Hague, CTIVD, available at: [www.ctivd.nl/binaries/ctivd/documenten/publicaties/2015/08/26/reactie-ctivd-conceptwetsvoorstel/reactie-ctivd-concept-wetsvoorstel-wiv-20xx.pdf](http://www.ctivd.nl/binaries/ctivd/documenten/publicaties/2015/08/26/reactie-ctivd-conceptwetsvoorstel/reactie-ctivd-concept-wetsvoorstel-wiv-20xx.pdf).

<sup>9</sup> The Netherlands, National Ombudsman (2015), Letter to the Minister of the Interior and Kingdom Relations, The Hague, 26 august 2015, available at: <https://www.nationaleombudsman.nl/system/files/bijlage/Brief%20aan%20minister%20van%20BZK%20over%20concept%20wetsvoorstel%20Wiv.pdf>, accessed on 26 June 2016.

<sup>10</sup> The Netherlands, Government (*Overheid*) (2016), 'Consultatie; Wet op de inlichtingen- en veiligheidsdiensten 20..; Consultatie berichten', available at: <https://www.internetconsultatie.nl/wiv/berichten>

<sup>11</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002, Wiv*), article 65, paragraph 2, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>12</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002, Wiv*), article 79, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

The Committee also carries out investigations. In 2015, the Committee commenced an investigation at the request of the House of Representatives regarding the implementation of two parliamentary motions on cooperation between the national services and foreign services. In addition, the Committee conducted three investigations in the context of its regular investigation programme, two of which involved the General Intelligence and Security Services' interception powers. In 2015, the Committee focussed on the transparency of personal data. In this context, on 3 March 2016, the CTIVD announced an investigation into the topics of notification and access to information at the General Intelligence and Security Services, and its military counterpart. The binding element herein is that both topics, according to law, focus on offering individual citizens, where possible, greater insight into the main, classified activities of both services in order to ensure that they are (more) capable of implementing the civil rights to which they are entitled. The CTIVD will focus its investigation on the processing of personal data. With respect to the topic of access to information, this means that only requests to inspect personal data fall within the investigation. The CTIVD will also look into the exchange of data in relation to (alleged) foreign terrorist fighters and the use of hacking powers in 2016.<sup>13</sup>

Within Parliament, there is a special committee which oversees the services: the Commission for the Intelligence and Security Services (*Commissie voor de Inlichtingen- en Veiligheidsdiensten, CiVD*). This committee is made up of the chairs of all political parties in parliament (eleven at the moment), as stipulated by Article 22 of the Procedural Rules (*Reglement van Orde*) of Parliament. This committee discusses issues in the field of the national security services with the Minister of the Interior and Kingdom Relations, the Minister of Defence and the Minister of Security. In 2014, it met eighteen times.<sup>14</sup> The meetings of the committee are strictly confidential. It publishes an annual report, addressed to the Lower House of Parliament, with information about the number of meetings and the agenda items.<sup>15</sup> In 2014 these items included mass surveillance, terrorist threats, jihadism, and the investigations into the MH17 disaster. The committee also dealt with a few letters from citizens and organisations.<sup>16</sup>

### 1.1.3 Independent oversight in relation to journalists and lawyers

In 2014, a bill regarding surveillance in relation to journalists was introduced in Parliament: the amendment of the Intelligence and Security Services Act 2002 relating to the introduction of an independent check preceding the execution of special powers towards journalists, aimed at tracking down their sources (*Wijziging van de Wet op de inlichtingen- en veiligheidsdiensten 2002 in verband met de invoering van een onafhankelijke bindende toets voorafgaand aan de inzet van bijzondere bevoegdheden jegens journalisten, welke gericht is op het achterhalen van hun bronnen*). The intention of the government was to proceed on the basis of the judgement of the European Court of Human Rights, Application no. 39315/06 in the case of *Telegraaf Media Nederland B.V. and others v the Netherlands*. In this case, the court judged the minister's approval in cases of telephone interception of conversations of journalists, as provided in the Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten, Wiv*)<sup>17</sup> as insufficient, because the minister is not deemed independent. The sources of journalists should be better protected. The bill proposes a different procedure in which the

5

<sup>13</sup> The Netherlands, CTIVD (2016), 'Jaarverslag 2015', The Hague, CTIVD, available at: <http://www.ctivd.nl/binaries/ctivd/documenten/jaarverslagen/2015/04/05/index/ctivd-jaarverslag-2015-lr.pdf>, accessed on 26 June 2016.

<sup>14</sup> The Netherlands, House of Representatives (*Tweede Kamer der Staten Generaal*) (2015), 'Verslag van de commissie voor de Inlichtingen- en Veiligheidsdiensten over haar werkzaamheden in 2014', available at: <https://zoek.officielebekendmakingen.nl/kst-34213-1.html>

<sup>15</sup> Netherlands, House of Representatives (*Tweede Kamer der Staten Generaal*) (2016), 'Commissie voor de Inlichtingen- en Veiligheidsdiensten', available at: [www.tweedekamer.nl/kamerleden/commissies/iv](http://www.tweedekamer.nl/kamerleden/commissies/iv)

<sup>16</sup> <https://zoek.officielebekendmakingen.nl/kst-34213-1.html>

<sup>17</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002, Wiv*), article 87, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

minister will ask for approval by the Hague District Court.<sup>18</sup> It has not been further discussed in the Lower House of Parliament after the initial preparation (3 November 2014). It is not clear whether this issue will be covered by the new law, as the amendments based on the internet consultation and the advice of the Council of State have not been made public yet.<sup>19</sup>

A similar issue was raised in connection with the interception of telephone and e-mail correspondence between lawyers and their clients. On 19 February 2015, parliamentary questions about the necessity of prior judicial approval in these case were asked, implying that judicial instead of ministerial approval should be required. The Minister of the Interior responded that the current safeguards (i.e. prior ministerial approval) were sufficient and that the lawyers' situation was different to that of journalists, because of an overriding requirement in the public interest justifying the present procedure. Moreover, the Review Committee provides a sufficient check for this procedure according to the minister.<sup>20</sup>

In summary proceedings on 1 July 2015, the District Court in The Hague decided otherwise, A number of lawyers had complained about being tapped, with the umbrella organisation for European lawyers, the Council of Bars and Law Societies of Europe from Brussels, acting as an intervening party. According to the lawyers, the legal professional privilege advocate-client was at stake. The Court stated that the present procedure was unlawful and contrary to Art. 8 and Art. 6 ECHR, because prior approval was not given by an independent body. Accordingly, the government had to amend the procedure within six months. If not, tapping and intercepting should be stopped immediately after that period. Moreover, the obtained information so far may not be used in criminal proceedings.<sup>21</sup>

In a letter of 27 July 2015 the Minister of the Interior reacted to parliament about this issue, announcing that the law would be amended to provide for independent judicial approval and that the cabinet was discussing the ways to implement this. At the same time, the government wanted more freedom on how and when to change the present procedure.<sup>22</sup> The government appealed against the decision of the Court, partly because the period of six months was considered too short to amend the present procedure. The Court of Appeal confirmed the judgment of the District Court in summary proceedings. Moreover, it stated that the government could also introduce policy measures within six months and did not necessarily have to draw up new legislation. Using the information unlawfully obtained in a criminal trial, is unacceptable in connection with the principle of fair trial.<sup>23</sup>

6

<sup>18</sup>Netherlands, Minister of the Interior and Kingdom Relations (Minister van Binnenlandse Zaken en Koninkrijksrelaties) (2014), Wijziging van de Wet op de inlichtingen- en veiligheidsdiensten 2002 in verband met de invoering van een onafhankelijke bindende toets voorafgaand aan de inzet van bijzondere bevoegdheden jegens journalisten, Explanatory Memorandum, available at: <https://zoek.officielebekendmakingen.nl/kst-34027-3.pdf>

<sup>19</sup> Netherlands, House of Representatives (*Tweede Kamer der Staten Generaal*)(2015), Wijziging van de Wet op de inlichtingen- en veiligheidsdiensten 2002 in verband met de invoering van een onafhankelijke bindende toets voorafgaand aan de inzet van bijzondere bevoegdheden jegens journalisten, welke gericht is op het achterhalen van hun bronnen, available at: <https://www.tweedekamer.nl/downloads/document?id=7e523927-5ea0-422f-90d1-e963fd1dd53a&title=Voorstel%20van%20wet.pdf>

<sup>20</sup> Netherlands, House of Representatives (*Tweede Kamer der Staten Generaal*)(2015), Questions by MPs Van Raak en Van Nispen to the Ministers of the Interior and Kingdom Relations answered at 9 March 2015, available at: <https://zoek.officielebekendmakingen.nl/ah-tk-20142015-1493.pdf>

<sup>21</sup> Netherlands, District Court The Hague (*Rechtbank Den Haag*) (2015), Case No.C/09/487229 / KG ZA 15-540, ECLI:NL:RBDHA:2015:7436m 1 July 2015, available at: <http://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7436>

<sup>22</sup> Netherlands, Minister of the Interior and Kingdom Relations (*Minister van Binnenlandse Zaken en Koninkrijksrelaties*), 'Schriftelijke reactie op uitspraak rechtbank Den Haag', 27 July 2015, available at: [www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/07/27/kamerbrief-over-afluisteren-van-advocaten-door-inlichtingen-en-veiligheidsdiensten/kamerbrief-over-afluisteren-van-advocaten-door-inlichtingen-en-veiligheidsdiensten.pdf](http://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/07/27/kamerbrief-over-afluisteren-van-advocaten-door-inlichtingen-en-veiligheidsdiensten/kamerbrief-over-afluisteren-van-advocaten-door-inlichtingen-en-veiligheidsdiensten.pdf)

<sup>23</sup> Netherlands, Court of Appeal The Hague (*Rechtbank Den Haag*) (2015), Case No.200.174.280-01, ECLI:NL:GHDHA:2015:2881, 27 October 2015, available at: <http://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2015:2881>

By the end of 2015 the Minister of the Interior and the Minister of Defence issued a regulation in which a temporary independent commission of control on the special powers Wiv 2002 with regard to lawyers and journalists was established. From 1 January 2016 onwards, this commission, chaired by the chair of the Review Committee, gives binding advice to the minister.<sup>24</sup> This is one of the most important developments in the field in the past few years. It can be concluded that this is an important move to shift powers from the government to an independent body in the field of the intelligence and security services, even though it remains a rather minimal move imposed by the courts.

#### 1.1.4 Publication of tapping statistics

In 2014, the District Court of The Hague considered a complaint about the Minister of the Interior's refusal to publish the number of times approval had been given to the General Intelligence and Security Service to tap information. The District Court judged that the minister was right in referring to the state's need for security reasons. The requested information was considered to provide too many details about the activities of the Service.<sup>25</sup> The party filing the complaint appealed before the Council of State. The Council of State annulled the decision by the District Court in January 2016, saying that the minister had provided insufficient justification for the assessment that state security was at stake. The minister had stated that a combination of the tapping statistics with other data which are published annually would give too much insight into, for example, the staffing of the General Intelligence and Security Service and its priorities, especially when the data was accumulated over several years. The Review Committee agreed with the the Council of State in this case, arguing that the publication of tapping statistics should be possible. The appellant referred to practices of published tapping statistics in some neighbouring countries.<sup>26</sup> The minister has to take a new, well-founded decision now, against which the appellant can appeal again to the Council of State.

7

<sup>24</sup> Netherlands, Minister of the Interior and Kingdom Relations & Minister of Defence (*Minister van Binnenlandse Zaken en Koninkrijksrelaties & Minister van Defensie*) (2015), Tijdelijke regeling onafhankelijke toetsing bijzondere bevoegdheden Wiv 2002 jegens advocaten en journalisten, available at: <http://wetten.overheid.nl/jci1.3:c:BWBR0037406&z=2016-01-01&g=2016-01-01>

Telephone interview with the representative of the Review Committee, 11 February 2016.

<sup>25</sup> Netherlands, District Court The Hague (*Rechtbank Den Haag*) (2014), Case No. AWB-14\_2157, ECLI:NL:RBDHA:2014:13355, 23 October 2014, available at:

<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:13355>

<sup>26</sup> Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*) (2016), Case no. 201409649/1/A3, ECLI:NL:RVS:2016:48, 13 January 2016, available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2016:48>

7

## 1.2 International intelligence services cooperation

### 1.2.1 Legal basis

International intelligence services cooperation has a legal basis: article 51 Wiv states that the heads of the services see to maintaining cooperation with eligible services in other countries. Information may be provided if this is not irreconcilable with the interests of the Dutch services and if it is not in conflict with the proper execution of their tasks. The same applies to the provision of technical assistance to other services. Such technical assistance will only be provided if the request is precise and justified. The minister involved has to give permission. Moreover, art. 37 Wiv states that the information may only be provided on the condition that it will not be passed on to third parties, unless approval is given by the minister involved. Article 41 Wiv, states that personal data of which the correctness cannot be assured, or personal data which were processed more than ten years ago without new data being processed concerning the person in question, will not be provided. Finally, art. 42 Wiv stipulates that the provision of personal data has to be registered.<sup>27</sup>

After the Snowden revelations, there were many questions in Parliament about programmes of mass cyber surveillance in the Netherlands. Snowden claimed, among other things, that the Dutch intelligence and security services were the “tapping king” of Europe and “puppets” of the American security services. The government stated that the Dutch services always acted within the limits of the law (Wiv) and that due to security reasons no substantive information on the cooperation with foreign services could be provided.<sup>28</sup> However, the government stated that cooperation depended on, among other things, the democratic standards in a certain country and the human rights situation. At the same time, the government decided to change procedural rules about the sharing of bulk data with other services. This means that personal ministerial approval is necessary for that purpose now.<sup>29</sup>

On the whole, the responsibilities in co-operating with foreign services lie with the minister and the heads of the services and little information, apart from very general standards, is shared, let alone details about the co-operation.

### 1.2.2 Oversight

Parliament has to be informed by different key players on a regular basis. The Minister of the Interior and Kingdom Relations sends a public report to both Houses of Parliament at the same time as the Minister of Defence, annually before 1 May, about the way in which the General Intelligence and Security Service performed its tasks in the previous year<sup>30</sup>. This does not include information about means used by the services in specific matters, secret sources, and

8

<sup>27</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002, Wiv*), article 87, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>28</sup> Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*)(2015), Questions by MP Van Raak to the Ministers of the Interior and Kingdom Relations & Minister of Defence answered at 11 February 2015, available at: <https://zoek.officielebekendmakingen.nl/ah-tk-20142015-1259.pdf>; The government never makes revelations in terms of contents (see also the answers to a Parliamentary question about American interference with European politics, and the possible role of the AIVD on 3 February 2016: Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*)(2015), Questions by MP Van Raak to the Ministers of the Interior and Kingdom Relations & Minister of Defence answered at 3 February 2015, available at: <https://zoek.officielebekendmakingen.nl/ah-tk-20152016-1355.pdf> accessed on 9 February 2016.

<sup>29</sup> Netherlands, Ministers of the Interior and Kingdom Relations & Minister of Defence (*Minister van Binnenlandse Zaken en Koninkrijksrelaties & Minister van Defensie*) (2015), 'Reactie op het interview van de heer Snowden', Letter to the House of Representatives (*Tweede Kamer der Staten-Generaal*), 6 februari 2015, available at: <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/02/06/kamerbrief-reactie-op-het-interview-van-de-heer-snowden/kamerbrief-reactie-op-het-interview-van-de-heer-snowden.pdf>

<sup>30</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002, Wiv*), article 8, paragraph 1, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>



the current level of knowledge of the services<sup>31</sup>. The Minister may provide this information in confidence.<sup>32</sup> If there is a reason for this, the Minister will inform both Houses of Parliament at their own initiative.<sup>33</sup>

There is a special parliamentary committee which oversees the services: the Commission for the Intelligence and Security Services (*Commissie voor de Inlichtingen- en Veiligheidsdiensten, CiVD*). This committee is made up of the chairs of all political parties in parliament (eleven at the moment), as stipulated by Article 22 of the Procedural Rules (*Reglement van Orde*) of Parliament. This committee discusses issues in the field of the national security services with the Minister of the Interior and Kingdom Relations, the Minister of Defence and the Minister of Security, including international cooperation. In 2014, it met eighteen times.<sup>34</sup> The meetings of the committee are strictly confidential. It publishes an annual report, addressed to the Lower House of Parliament, with information about the number of meetings and the agenda items.<sup>35</sup> In 2014 these items included mass surveillance, terrorist threats, jihadism, and the investigations into the MH17 disaster. In several of these items, the international cooperation with services of other countries is mentioned as a sub-item. The committee also dealt with a few letters from citizens and organisations.<sup>36</sup>

Another oversight body, already briefly referred to above, is the Review Committee on the Intelligence and Security Services (*Commissie van Toezicht betreffende de Inlichtingen- en Veiligheidsdiensten, CTIVD*), an independent body with legal basis in Article 64, Wiv. It consists of three members, proposed by the Ministers involved and appointed by Royal Decree (Article 65, paragraph 2, Wiv). The Ministers involved, the heads of the services, their coordinator and everyone who is involved in the execution of the Wiv have to provide all requested information and further cooperation to this committee. The CTIVD has access to all available information. It has the power to carry out investigations (Article 78, paragraph 2, Wiv). It then writes a supervisory report. This report is public, except for information about means used by the services in specific matters, secret sources and the current level of the services (Article 79, paragraph 1, in conjunction with Article 8, paragraph 3, Wiv). Recommendations may be made to the Minister involved (Article 79, paragraph 3, Wiv). The CTIVD cannot issue binding decisions.

In April 2014, the House of Representatives adopted two motions during a plenary debate about interception by the American intelligence service, the NSA. In motion no. 89, the government was asked to provide further substantiation of the criteria for cooperation with foreign intelligence and security services. In motion no. 96, the House of Representatives identified that sets of (meta) data are exchanged structurally with foreign intelligence and security services and asked the government to only permit this activity if prior permission had been sought from the minister concerned. In both motions, the House of Representatives asked the Committee to monitor the implementation thereof. In July 2015, the Committee announced an investigation into how the intelligence and security services interpreted these motions. It

9

<sup>31</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002, Wiv*), Article 79, paragraph 1, in conjunction with Article 8, paragraph 3, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>32</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002, Wiv*), Article 8, paragraph 4, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>33</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002, Wiv*), Article 8, paragraph 5, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>34</sup> The Netherlands, House of Representatives (*Tweede Kamer der Staten Generaal*) (2015), 'Verslag van de commissie voor de Inlichtingen- en Veiligheidsdiensten over haar werkzaamheden in 2014', available at: <https://zoek.officielebekendmakingen.nl/kst-34213-1.html>

<sup>35</sup> Netherlands, House of Representatives (*Tweede Kamer der Staten Generaal*) (2016), 'Commissie voor de Inlichtingen- en Veiligheidsdiensten', We page, available at: [www.tweedekamer.nl/kamerleden/commissies/iv](http://www.tweedekamer.nl/kamerleden/commissies/iv)

<sup>36</sup> The Netherlands, House of Representatives (*Tweede Kamer der Staten Generaal*) (2015), 'Verslag van de commissie voor de Inlichtingen- en Veiligheidsdiensten over haar werkzaamheden in 2014', available at: <https://zoek.officielebekendmakingen.nl/kst-34213-1.html>

intended to publish two reports in spring 2016. However, the reports were sent to the ministers on 13 May 2016 and have not been published yet.<sup>37</sup>

By the end of 2015 the Minister of the Interior and Kingdom Relations and the Minister of Defence established a special oversight body for intelligence services in connection with lawyers and journalists. They issued a regulation in which a temporary independent commission of control on the special powers Wiv 2002 with regard to lawyers and journalists was established. From 1 January 2016 onwards, this commission, chaired by the chair of the Review Committee, gives binding advice to the minister.<sup>38</sup>

The judiciary also oversees the services: District Courts or Court of Appeal, Supreme Court or Council of State. If the Minister involved or the Review Committee on the Intelligence and Security Services are required to submit information or documents in public law procedures before a court, they may inform the court or the court of appeal that only they may take notice of the information or the documents. The court can then only pronounce judgement on the basis of that information or those documents with the approval of the other parties. If the Minister involved or the Review Committee on the Intelligence and Security Services refuses to submit the information or the documents (no reasons have to be provided), the courts may draw their conclusions in the way they think appropriate.<sup>39</sup> The judgements are binding in each particular case.

Another oversight body is the National Ombudsman (*Nationale Ombudsman*). The Lower House of Parliament appoints the National Ombudsman based on independence and integrity after a recommendation by the vice president of the Council of State, the president of the Supreme Court and the president of the General Audit Office, consisting of a selection of at least three persons.<sup>40</sup> Everyone has the right to complain to the National Ombudsman about the activities or alleged activities of the Ministers involved, the heads of the services, the coordinator and the persons employed for the services.<sup>41</sup> Firstly, a complaint with the officials involved has to be filed. If this is not resolved satisfactorily, one can write a letter to the National Ombudsman within one year. The National Ombudsman will check whether he is competent to deal with the complaint. In this case, as shown above, there is a legal basis. The Ombudsman will decide how to deal with the complaint within three weeks, in a tailor-made way. This may include an immediate request for a reaction by the officials involved. It can also include mediation, or, lastly, an investigation. In this case, both parties will be addressed in writing and they can subsequently react to each other. The Ombudsman will then either lay down conclusions in a public report, with anonymous details, or send a letter which is not made public.<sup>42</sup>

Finally, the Minister of the Interior and Kingdom Relations also oversees activities. He or she sends a public report to both Houses of Parliament at the same time as the Minister of Defence, annually before 1 May, describing the way in which the General Intelligence and Security

10

<sup>37</sup> Netherlands, CTIVD (2016), 'AIVD en MIVD onderzoek "uitvoering twee Kamer moties"', website, available at: <http://www.ctivd.nl/onderzoeken/a/aivd-mivd-2-kamer moties>, accessed on 26 June 2016.

<sup>38</sup> Netherlands, Minister of the Interior and Kingdom Relations & Minister of Defence (*Minister van Binnenlandse Zaken en Koninkrijksrelaties & Minister van Defensie*) (2015), Tijdelijke regeling onafhankelijke toetsing bijzondere bevoegdheden Wiv 2002 jegens advocaten en journalisten, available at: <http://wetten.overheid.nl/jci1.3:c:BWBR0037406&z=2016-01-01&g=2016-01-01>

Telephone interview with the representative of the Review Committee, 11 February 2016.

<sup>39</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, Wiv), article 87, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>40</sup> The Netherlands, Act on the National Ombudsman 1981 (*Wet Nationale ombudsman 1981*), Article 2, paragraph 2, available online at: <http://wetten.overheid.nl/BWBR0003372/2015-01-01>

<sup>41</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, Wiv), Article 83, paragraph 1, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>42</sup> Netherlands, National Ombudsman (Nationale Ombudsman) (2016), 'Procedure', website, available at: [www.nationaleombudsman.nl/kunnen-wij-u-helpen/procedure](http://www.nationaleombudsman.nl/kunnen-wij-u-helpen/procedure)

Service performed its tasks in the previous year.<sup>43</sup> This report does not include information about means used by the services in specific matters, secret sources, and the current level of knowledge of the services.<sup>44</sup> The Minister may provide this information in confidence. If there is a reason for this, the Minister will inform both Houses of Parliament at his or her own initiative.<sup>45</sup>

In all these cases, international intelligence services cooperation may be an issue. However, the minister and the services share very little information. Because parliament has asked the Review Committee on the Intelligence and Security Services to delve deeper, more information may become available when it has published its reports.

<sup>43</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, *Wiv*), Article 8, paragraph 1, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>44</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, *Wiv*), Article 79, paragraph 1, in conjunction with Article 8, paragraph 3, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>45</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, *Wiv*), Article 79, paragraph 1, in conjunction with Article 8, paragraph 4 and 5, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

## 1.3 Access to information and surveillance

### 1.3.1 Exemption

No complete exemption to surveillance measures in relation to access to information applies, although in practice the heads of the services and the ministers involved can keep information confidential. The Government Information (Public Access) Act (WOB), which is a general Act giving citizens the right to receive information from government bodies, does not apply on the basis of Article 45 of the Intelligence and Security Services Act.<sup>46</sup> The rules based on this act (see 1.3.2. below) apply.

Anyone may approach the judiciary or the National Ombudsman for information about the activities of the services. However, the services' information may remain confidential. Article 87 Wiv stipulates the following: if the Minister involved or the Review Committee on the Intelligence and Security Services are required to submit information or documents in public legal procedures before a court, they may inform the court or the court of appeal that only the court(s) may take notice of the information or the documents. The court can then only pronounce judgement with the approval of the minister or the Review Committee on the basis of the information or the documents provided by the minister or the Review Committee. If the Minister involved or the Review Committee on the Intelligence and Security Services refuses to submit the information or the documents (whereby no justification has to be given), the courts may draw their conclusions in the way they think appropriate. If documents have to be submitted, it is sufficient if they may only be inspected. No copies may be made.<sup>47</sup>

Everyone has the right to complain to the National Ombudsman about the activities or alleged activities of the ministers involved, the heads of the services, their coordinator and the persons employed by the services, according to the following procedure:<sup>48</sup> firstly, a complaint with the officials involved has to be filed. If this is not resolved satisfactorily, one can write a letter to the National Ombudsman within one year. The National Ombudsman will check whether he is competent to deal with the complaint. In this case, as shown above, there is a legal basis. The Ombudsman will decide how to deal with the complaint within three weeks, in a tailor-made way. This may include an immediate request for a reaction by the officials involved. It can also include mediation, or, lastly, an investigation. In this case, both parties will be addressed in writing and they can subsequently react to each other. The Ombudsman will then either lay down conclusions in a public report, with anonymous details, or send a letter which is not made public.<sup>49</sup>

### 1.3.2 Right to access information

Individuals have a right to access information on whether they are subject to surveillance. Everyone who makes a request to be informed will be informed by the minister involved as soon as possible, but at most within three months, whether, and if yes which, personal data concerning him or her were processed by or for the benefit of a service. When a request is granted, the Minister involved will give the applicant the opportunity to inspect his or her data

12

<sup>46</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, Wiv), article 45, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>47</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, Wiv), article 87, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>48</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, Wiv), article 83, paragraph 1, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>49</sup> Netherlands, National Ombudsman (Nationale Ombudsman) (2016), 'Procedure', website, available at: [www.nationaleombudsman.nl/kunnen-wij-u-helpen/procedure](http://www.nationaleombudsman.nl/kunnen-wij-u-helpen/procedure)

as soon as possible, but at most within four weeks of the moment that the decision was announced.<sup>50</sup>

There are some grounds for refusal and limitations: a request will be refused if data concerning the applicant have been processed in the context of an investigation, unless: the data were processed more than five years ago; since that time no new data concerning him or her have been processed in this context; the data in question are not relevant for any current investigation. The request will also be refused if no data concerning the applicant have been processed. If a request is thus rejected, the justification will only be provided in general terms.

In the case of targeted tapping, receiving, recording and listening in to any form of a conversation, telecommunication or transfer of data by means of an automated work (for example, a telephone or a computer)<sup>51</sup> or in the case of receiving and recording telecommunication which is not cable-bound without a target, whereby data are being selected, among other things, on the basis of identity, a number as referred to in the Telecommunication Act, or any technical characteristic, or a subject based on key words, the following applies: the involved minister shall investigate, five years after the exercise of these powers, and every year after that, whether a report may be issued to the person involved. If this is possible, this will happen as soon as possible.<sup>52</sup> If this is not possible the Review Committee on the Intelligence and Security Services will be informed and the decision will be justified. Issuing a report is not necessary if this is not reasonably possible.<sup>53</sup> The report will be postponed if personal data are involved in an investigation in connection with which a person would not get any information either at their request.<sup>54</sup>

The duty to investigate the possibility to issue a report will not be applied if issuing a report about the exercise of powers is reasonably expected to reveal sources of a service, among which intelligence and security services of other countries, seriously damage relations with other countries and with international organisations or reveal a specific application of a method of a service or the identity of the one who has been helpful to the service.<sup>55</sup>

<sup>50</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, *Wiv*), Article 47, paragraphs 1 and 2, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>51</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, *Wiv*), article 25, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>52</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, *Wiv*), articles 25, paragraph 1 *Wiv* and article 27, paragraph 1 under a and b, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>53</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, *Wiv*), article 34, paragraphs 1 u/i 3, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>54</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, *Wiv*), Article 34, paragraph 6, in connection with Article 47 and 53, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

<sup>55</sup> The Netherlands, Intelligence and Security Service Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*, *Wiv*), article 35, paragraph 7, available online at: <http://wetten.overheid.nl/BWBR0013409/2013-01-01>

## 1.4 Update the FRA report

### Introduction

#### 1 Intelligence services and surveillance laws

##### 1.1 Intelligence services

Bottom of page 13, after Almost . . . activities:

There are, for example, two different bodies carrying out civil and military intelligence activities, established by the Wet op de inlichtingen- en veiligheidsdiensten 2002 (Intelligence and Security Services Act 2002 , hereinafter: Act) in the Netherlands.

##### 1.2 Surveillance measures

No comments.

##### 1.3. Member States' laws on surveillance

On page 22, after the reference to footnote 133:

There is only one Act in the Netherlands which deals with surveillance, and, for example, the organisation of the service: the Act on the Intelligence and Security Services. However, the responsible minister, in this case the Minister of the Interior, may take decisions in law with further details on the organisation, methods used and management of the service.

### FRA key findings

No comments

#### 2 Oversight of intelligence services

##### 2.1 Executive control

Bottom of page 33, instead of the first two sentences (In the Netherlands . . . coordinator):

In the Netherlands, executive control rests with the Minister of the Interior, who, together with the Minister of of Defence and the Minister of General Affairs (the Prime Minister) is in charge of appointing the coordinator for the intelligence service (AIVD). The Prime Minister instructs the Coordinator, in agreement with the Minister of the Interior and the Minister of Defence.

##### 2.2 Parliamentary oversight

Page 38, bottom, in stead of the paragraph: The Dutch . . .service:

Within Parliament, there is a special committee which oversees the services: the Commission for the Intelligence and Security Services (*Commissie voor de Inlichtingen- en Veiligheidsdiensten, CiVD*). This committee is made up of the chairs of all political parties in parliament (eleven at the moment), as stipulated by Article 22 of the Procedural Rules

(*Reglement van Orde*) of Parliament. This committee discusses issues in the field of the national security services with the Minister of the Interior and Kingdom Relations, the Minister of Defence and the Minister of Security. In 2014, it met eighteen times.<sup>56</sup> The meetings of the committee are strictly confidential. It publishes an annual report, addressed to the Lower House of Parliament, with information about the number of meetings and the agenda items.<sup>57</sup> In 2014 these items included mass surveillance, terrorist threats, jihadism, and the investigations into the MH17 disaster. The committee also dealt with a few letters from citizens and organisations.<sup>58</sup>

### 2.2.1 Mandate

No comment

### 2.2.2 Composition

No comment

### 2.2.3 Access to information and documents

Page 41, top, before 'Therefore . . . demand it'.

In the Netherlands, the Parliamentary Commission for the Intelligence and Security Services is regularly informed about the operational activities of the General Intelligence and Security Service and has access to the confidential part of the annual report of the latter.<sup>59</sup>

### 2.2.4 Reporting to parliament

Within parliament, there is a special committee which oversees the issues of the services. The committee, Commission for the Intelligence and Security Services (*Commissie voor de Inlichtingen- en Veiligheidsdiensten, CiVD*) consists of the chairs of all political parties in parliament (eleven) and has to keep its meetings confidential, as far as details are concerned. However, it does publish an annual report, addressed to the Lower House of Parliament, with information about how often it met and what the items on the agenda were.<sup>60</sup>

## 2.3 Expert oversight

### 2.3.1 Specialised expert bodies

Page 45, after the paragraph 'An ad-hoc committee . . . non-binding':

The Minister of the Interior and the Minister of Defence issued a regulation in which a temporary independent commission of control regarding the special powers Wiv 2002 with regard to tapping and getting information of lawyers and journalists was established. As of 1 January 2016, this commission, of whom the chair of the Review Committee is the chair as well, gives binding advice to the Minister.<sup>61</sup> This is one of the most important developments in the field in the past few years.

15

<sup>56</sup> The Netherlands, House of Representatives (*Tweede Kamer der Staten Generaal*) (2015), 'Verslag van de commissie voor de Inlichtingen- en Veiligheidsdiensten over haar werkzaamheden in 2014', available at: <https://zoek.officielebekendmakingen.nl/kst-34213-1.html>

<sup>57</sup> Netherlands, House of Representatives (*Tweede Kamer der Staten Generaal*)(2016), 'Commissie voor de Inlichtingen- en Veiligheidsdiensten', We page, available at: [www.tweedekamer.nl/kamerleden/commissies/iv](http://www.tweedekamer.nl/kamerleden/commissies/iv)

<sup>58</sup> The Netherlands, House of Representatives (*Tweede Kamer der Staten Generaal*) (2015), 'Verslag van de commissie voor de Inlichtingen- en Veiligheidsdiensten over haar werkzaamheden in 2014', available at: <https://zoek.officielebekendmakingen.nl/kst-34213-1.html>

<sup>59</sup> Netherlands, General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst - AIVD*) (2015), 'Jaarverslag CIVD 2014 naar de Kamer' News release, 2 June 2015, available at: <https://www.aivd.nl/actueel/nieuws/2015/06/02/jaarverslag-civd-2014-naar-de-kamer>

<sup>60</sup> Netherlands, House of Representatives (*Tweede Kamer der Staten Generaal*)(2016), 'Commissie voor de Inlichtingen- en Veiligheidsdiensten', We page, available at: [www.tweedekamer.nl/kamerleden/commissies/iv](http://www.tweedekamer.nl/kamerleden/commissies/iv)

<sup>61</sup> Netherlands, Minister of the Interior and Kingdom Relations & Minister of Defence (*Minister van Binnenlandse Zaken en Koninkrijksrelaties & Minister van Defensie*) (2015), Tijdelijke regeling onafhankelijke toetsing

### 2.3.2 Data protection authorities

No changes have occurred. On the basis of the Data Protection Act (*Wet bescherming persoonsgegevens*) the Dutch DPA has no power in the field of intelligence and security activities.<sup>62</sup>

## 2.4 Approval and review of surveillance measures

No comments.

### FRA key findings

No comments.

## 3 Remedies

### 3.1 A precondition: obligation to inform and the right to access

Page 64, in the paragraph ‘In the Netherlands . . . intelligence service’, after ‘nobody had been notified’:

In 2013, the Dutch Review Committee carried out an investigation and saw that at the end of its research period (the report was published on 29 May 2013) the General Intelligence and Security Service had notified thirteen persons about surveillance in their cases.<sup>63</sup> This shows an improvement. In the beginning of 2016, the Review Committee will conduct a follow-up investigation again. It is expected to be finalised in about six months.<sup>64</sup>

### 3.2 Judicial remedies

No comment.

#### 3.2.1 Lack of specialisation and procedural obstacles

No comment.

#### 3.2.2 Specialised judges and quasi-judicial tribunals

No comment.

### 3.3 Non-judicial remedies: independence, mandate and powers

#### 1.3.1 Types of non-judicial bodies

Page 74, in the end of the paragraph ‘The Dutch Review . . . suggestions’:

The Review Committee, therefore, does not really provide remedies to individuals. Starting 1 January 2016 a temporary independent commission of control on the special powers Wiv 2002 with regard to lawyers and journalists was established. From 1 January 2016 onwards, this commission, chaired by the chair of the Review Committee, gives binding advice to the minister.

bijzondere bevoegdheden Wiv 2002 jegens advocaten en journalisten, available at: <http://wetten.overheid.nl/jci1.3:c:BWBR0037406&z=2016-01-01&g=2016-01-01>

<sup>62</sup> Netherlands, Data Protection Act (*Wet bescherming Persoonsgegevens*), Article 2, paragraph 2, available at: <http://wetten.overheid.nl/BWBR0011468/2016-01-01>

<sup>63</sup> Netherlands, Review Committee for the Intelligence and Security Services (Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten - CTIVD) (2013), *Toezichtsrapport 34 over het vervolgonderzoek naar de rechtmatigheid van de uitvoering van de notificatieplicht door de AIVD*, available at: <http://www.ctivd.nl/binaries/ctivd/documenten/rapporten/2013/07/17/index/CTIVD+rapport+34.pdf>

<sup>64</sup> Telephone interview with a representative of the Review Committee, 7 April 2016.



### **3.3.2 The issue of independence**

No comment.

### **3.3.3 Powers and specialisation of non-judicial remedial bodies**

No comment.

### **FRA key findings**

No comment.

### **Conclusions**

No comment

## 1.5 Check the accuracy of the figures and tables published in the FRA report (see the annex on Figures and Tables)

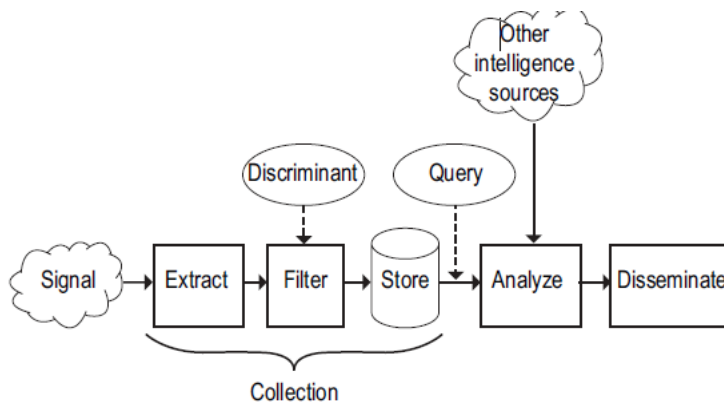
### 1.5.1 Overview of security and intelligence services in the EU-28

No other overview is available in the Netherlands.

	Civil (internal)	Civil (external)	Civil (internal and external)	Military
NL			General Intelligence and Security Service/ <i>Algemene Inlichtingen- en Veiligheidsdienst</i> (AIVD)	Military Intelligence and Security Service/ <i>Militaire Inlichtingen- en Veiligheidsdienst</i> (MIVD)

### 1.5.2 Figure 1: A conceptual model of signals intelligence

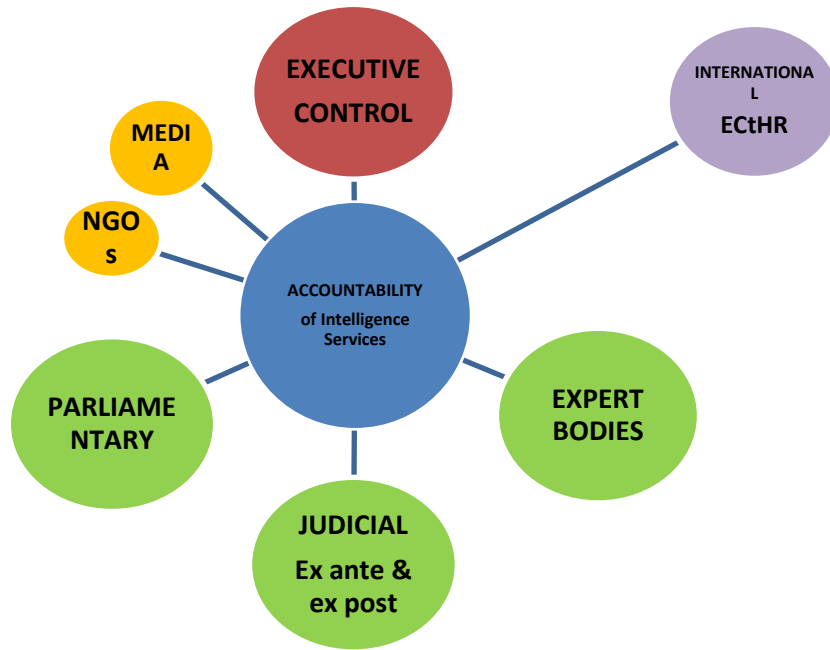
No different figure was found in the Netherlands.



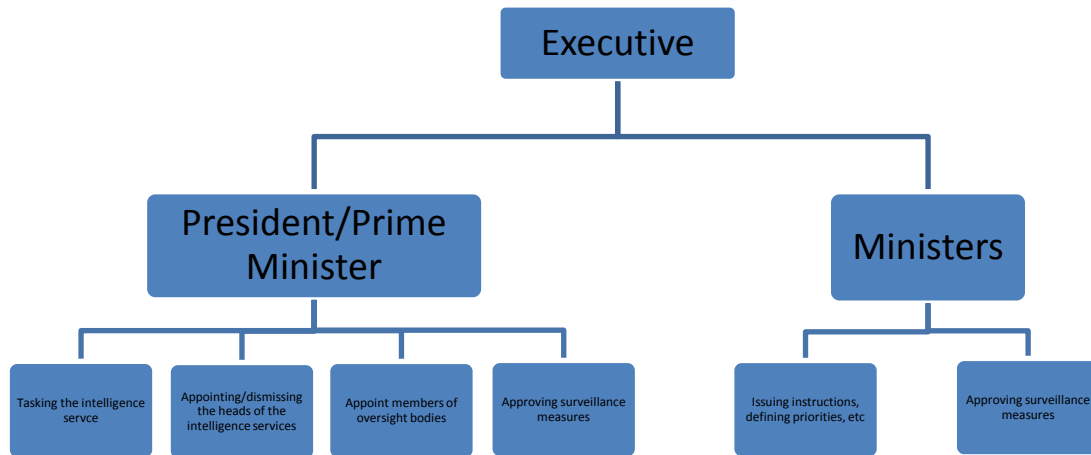
### 1.5.3 Figure 2: Intelligence services' accountability mechanisms

Please confirm that Figure 2 below (p. 31 of the FRA Report) illustrates the situation in your Member State in an accurate manner. If it is not the case, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

The figure is accurate.



**1.5.4 Figure 3: Forms of control over the intelligence services by the executive across the EU-28**



The Prime Minister does not task the intelligence services. Parliament decides on a budget, on which the tasking is based.<sup>65</sup> Moreover, the Prime Minister does not appoint or dismiss the heads of the intelligence services. This is done by the Minister of the Interior for a period of seven years, after having received approval by all ministers in the cabinet.<sup>66</sup> The appointment of the members of the oversight bodies, i.e. the Review Committee, is done by Royal Decree by the Minister of the Interior and the Minister of Defence. It should be given Royal Assent.<sup>67</sup> The National Ombudsman is appointed by the Lower House of Parliament (Art. 2, paragraph 2, of the Act on the National Ombudsman). The Prime Minister does not approve surveillance measures. This is done by the Minister of the Interior or the Minister of Defence (Art. 19 Wiv).

The first box under President/Prime Minister should therefore be moved and on top there should be a box: Parliament. Another box under Parliament should be: ‘Appointing National Ombudsman’. The second box under President/Prime Minister should be moved to Ministers, just like the third box. The fourth box under President/Prime Minister should be removed. In other words, the President/Prime Minister has no major role.

**1.5.5 Table 1: Categories of powers exercised by the parliamentary committees as established by law**

Information is correct.

<sup>65</sup> E-mail correspondence with a representative of the General Intelligence and Security Service, 19 February 2016.

<sup>66</sup> Netherlands, Office for the Senior Civil Service (*Algemene Bestuursdienst*) (2016), ‘Rechtspositie topmanagementgroep’, Web page, available at: <http://www.algemenebestuursdienst.nl/organisatie/inhoud/topmanagementgroep/rechtspositie-topmanagementgroep>

<sup>67</sup> Netherlands, Intelligence and Security Services Act 2002 (*Wet op de Inlichtingen- en veiligheidsdiensten 2002*), Article 65. paragraph 1, available at: <http://wetten.overheid.nl/jci1.3:c:BWBR0013409&hoofdstuk=6&paragraaf=6.1&artikel=65&z=2013-01-01&g=2013-01-01>; Netherlands, Decision about the appointment of a member of the Review Committee (*Besluit houdende benoeming van een lid van de CTIVD*).

Member States	Essential powers	Enhanced powers
NL	X	

*Note:* Finland, Ireland, Malta and Portugal do not have parliamentary committees that deal with intelligence services.

### 1.5.6 Table 2: Expert bodies in charge of overseeing surveillance, EU-28

Information is correct.

EU Member State	Expert Bodies
NL	The Review Committee on the Intelligence and Security Services ( <i>Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten</i> )

### 1.5.7 Table 3: DPAs' powers over national intelligence services, EU-28

Information is correct.

EU Member State	No powers	Same powers (as over other data controllers)	Limited powers
NL	X		

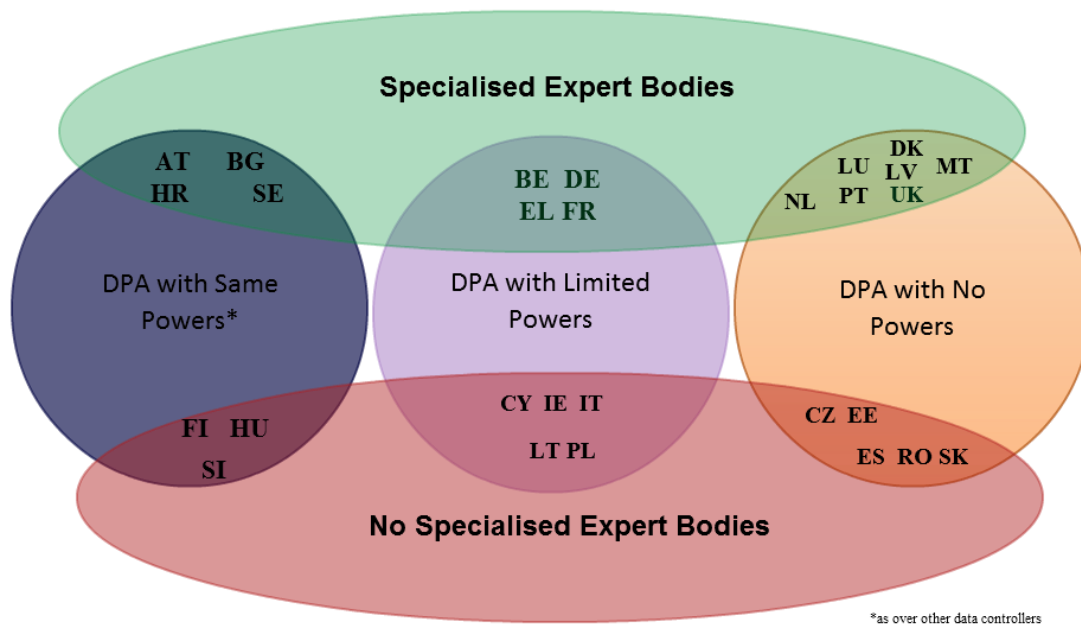
*Notes:* *No powers:* refers to DPAs that have no competence to supervise NIS.

*Same powers:* refers to DPAs that have the exact same powers over NIS as over any other data controller.

*Limited powers:* refers to a reduced set of powers (usually comprising investigatory, advisory, intervention and sanctioning powers) or to additional formal requirements for exercising them.

### 1.5.8 Figure 4: Specialised expert bodies and DPAs across the EU-28

Figure is accurate.



### 1.5.9 Table 4: Prior approval of targeted surveillance measures, EU-28

Table is accurate.

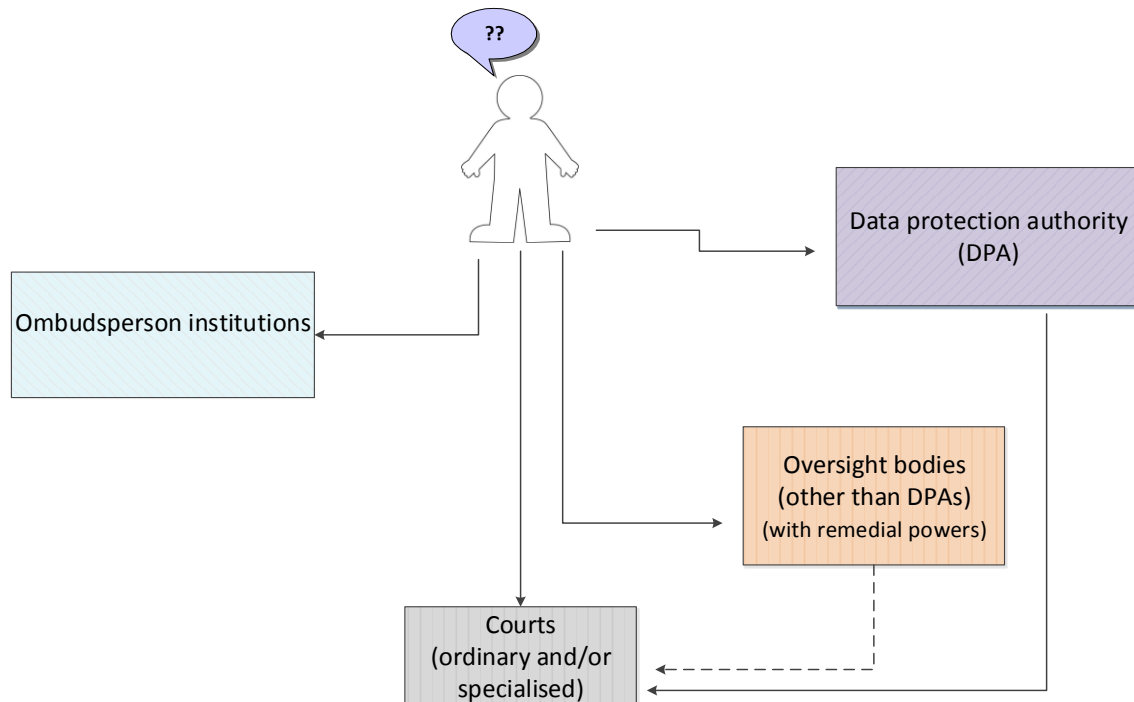
EU Member State	Judicial	Parliamentary	Executive	Expert bodies	None
NL			X		

### 1.5.10 Table 5: Approval of signals intelligence in France, Germany, the Netherlands, Sweden and the United Kingdom

Table is accurate

EU Member State	Judicial	Parliamentary	Executive	Expert
NL			X (selectors)	

### 1.5.11 Figure 5: Remedial avenues at the national level



A complainant in the Netherlands has no recourse to the DPA. Moreover, he or she cannot approach another oversight body (CTIVD) directly either. Apart from the executive, he or she can only approach the Ombudsman or the courts. In the case of the Ombudsman,<sup>68</sup> the complainant must also first approach the Minister of the Interior who should thus be put into the position to give their view first.<sup>69</sup> The Minister, before giving their view, should ask the Dutch Review Committee for its advice.<sup>70</sup> The Ombudsman will then give their judgement and possibly a recommendation to the Minister and the complainant.<sup>71</sup> The Minister will then decide about the consequences and send their decision, including the Ombudsman's judgement and their recommendations, to the Ombudsman and one or both Houses of Parliament.<sup>72</sup>

Therefore, the line to the DPA should be removed, just like the line to Oversight bodies.

<sup>68</sup> Netherlands, Intelligence and Security Services Act 2002 (*Wet op de Inlichtingen- en veiligheidsdiensten 2002*), Article 83, paragraph 1, available at:

<http://wetten.overheid.nl/jci1.3:c:BWBR0013409&hoofdstuk=6&paragraaf=6.5&artikel=83&z=2013-01-01&g=2013-01-01>

<sup>69</sup> Netherlands, Intelligence and Security Services Act 2002 (*Wet op de Inlichtingen- en veiligheidsdiensten 2002*), Article 83, paragraph 1, available at:

<http://wetten.overheid.nl/jci1.3:c:BWBR0013409&hoofdstuk=6&paragraaf=6.5&artikel=83&z=2013-01-01&g=2013-01-01>

<sup>70</sup> Netherlands, Intelligence and Security Services Act 2002 (*Wet op de Inlichtingen- en veiligheidsdiensten 2002*), Article 83, paragraph 3, available at:

<http://wetten.overheid.nl/jci1.3:c:BWBR0013409&hoofdstuk=6&paragraaf=6.5&artikel=83&z=2013-01-01&g=2013-01-01>

<sup>71</sup> Netherlands, Intelligence and Security Services Act 2002 (*Wet op de Inlichtingen- en veiligheidsdiensten 2002*), Article 84, paragraph 1 and 2, available at:

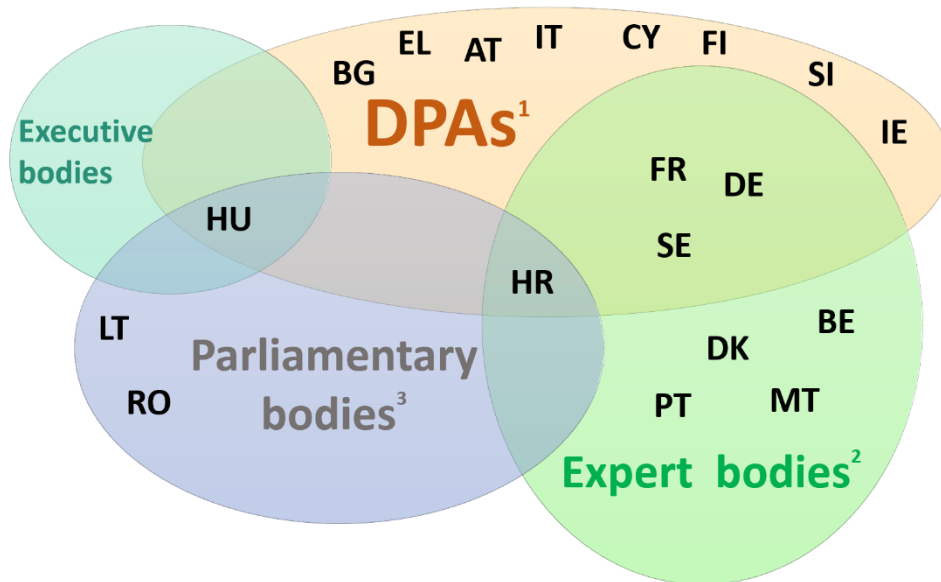
<http://wetten.overheid.nl/jci1.3:c:BWBR0013409&hoofdstuk=6&paragraaf=6.5&artikel=84&z=2013-01-01&g=2013-01-01>

<sup>72</sup> Netherlands, Intelligence and Security Services Act 2002 (*Wet op de Inlichtingen- en veiligheidsdiensten 2002*), Article 84, paragraph 3 and 4, available at:

<http://wetten.overheid.nl/jci1.3:c:BWBR0013409&hoofdstuk=6&paragraaf=6.5&artikel=84&z=2013-01-01&g=2013-01-01>

**1.5.12 Figure 6: Types of national oversight bodies with powers to hear individual complaints in the context of surveillance, by EU Member States**

Correct in the report, not in these guidelines (there is a difference between the two).



- Notes: 1. The following should be noted regarding national data protection authorities: In Germany, the DPA may issue binding decisions only in cases that do not fall within the competence of the G 10 Commission. As for 'open-sky data', its competence in general, including its remedial power, is the subject of on-going discussions, including those of the NSA Committee of Inquiry of the German Federal Parliament
2. The following should be noted regarding national expert oversight bodies: In Croatia and Portugal, the expert bodies have the power to review individual complaints, but do not issue binding decisions. In France, the National Commission of Control of the Intelligence Techniques (CNCTR) also only adopts non-binding opinions. However, the CNCTR can bring the case to the Council of State upon a refusal to follow its opinion. In Belgium, there are two expert bodies, but only Standing Committee I can review individual complaints and issue non-binding decisions. In Malta, the Commissioner for the Security Services is appointed by, and accountable only to, the prime minister. Its decisions cannot be appealed. In Sweden, seven members of the Swedish Defence Intelligence Commission are appointed by the government, and its chair and vice chair must be or have been judges. The remaining members are nominated by parliament.
3. The following should be noted regarding national parliamentary oversight bodies: only the decisions of the parliamentary body in Romania are of a binding nature.