



BELGIAN SENATE



## 6<sup>th</sup> Conference of the Parliamentary Committees for the Oversight of Intelligence and Security Services of the European Union Member States

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### PARTNERS IN BUSINESS ?

Many of you will be familiar with concepts like Cradle to Cradle, Fairtrade and the like.

The idea behind these concepts is that when you buy an article with such a label you can be assured that this article is produced in conformity with the principles of durability and that the farmers or producers in the country of origin get a fair share of the price you are paying.

You yourself are of course not able to visit the clothes factory in India or China, or the coffee plantation in Africa or Latin America. You have to trust the Cradle to Cradle or Fairtrade organisation.

Multinationals like Shell or Unilever have found their own way of showing to the public that they feel responsible. They adhere generally to their (own) Code of Business Conduct.

Shell for instance will state that Shell officials will not accept bribes and will not participate in bribery, and that every business unit will see to it that firms they are doing business with will adhere to more or less the Shell Code. This means that Shell and other multinationals proclaim that their business partners pay their employees decent salaries and that these employees can perform their job under reasonable working conditions. Once again, if you buy a Shell product you do not know under which circumstances it was acquired by Shell: you have to trust the firm. If you are a reader of the financial press you will notice that at shareholders meetings there will be quite often someone questioning the management about this subject and invariably a soothing answer will be given.

Every once in a while however there will be a human rights related organisation doing some real field work on the subject matter. Recently this happened to H&M and C&A, as you will know both important in the world of low to average priced clothing. The researchers found out that clothes were made in India under absolute substandard conditions for the workers who were kept like slaves. The response of the accused firms was: *“we did not know this, but we will look into the matter”*.

What, you might ask, does this introduction have to do with the matters we are discussing today ?

Let me stick to the Dutch case, involving Parliament, the General Intelligence and Security Service (AIVD or GISS), the Defence Intelligence and Security Service (MIVD or DISS) and our Review Committee (CTIVD).

GISS, and the same goes for DISS, can of course not be considered as an organisation like Fair Trade or a multinational, but it does have an extensive network of relations with services abroad. Some of the contacts are only formal but there are also services with which there exists a close relationship.

The question thus arises how is GISS doing business with other services ?

And who will judge whether the decision to enter into a business relationship can be considered to be right ?

For this matter I will not dwell upon the distinction between the two kinds of cooperation mentioned in the Dutch law: the provision of information and the rendering of technical and other forms of assistance to another service. Both forms of cooperation may only take place if the interests to be served by the foreign service are not incompatible with interests served by the Dutch service and if the cooperation is not incompatible with the proper performance of its statutory tasks by the Dutch service.

For the discussion today what matters is that the interests to be served by the Dutch service must be deemed to include the standards, and more precisely the fundamental and human rights standards, laid down in the Constitution and in the international conventions ratified by the Netherlands.

Proper cooperative relations are of course essential for the adequate performance of the tasks of the service. Essential, because the information obtained by such cooperation considerably extends the information position of the service and thus increases its capability to assess security risks and issue when necessary a timely warning.

The prime responsibility to decide with which foreign service GISS will cooperate lies with the head of the service. The Minister of the Interior, who is politically responsible for GISS will have to be informed, and in the case of what is termed a “high-risk” counterpart the decision-making must be submitted to the Minister. The potential degree of reciprocity also plays a role in the cooperation with a foreign service.

Democratic anchorage and respect for human rights play an essential role in this decision making process about entering into and maintaining relations with a foreign service.

With regard to democratic anchorage one has to look at the general political system of the country involved and the position of the relevant service within that system, the statutory powers of, and the oversight over the service.

Recently I spent a short vacation in Uzbekistan (following the Silk Road). I had to change planes in Moscow and there I got hold of a copy of The Moscow Times with an article about the FSB (the former KGB). The authors quoted from an interview given by Nikolai Patrushev, then director of the Federal Security Services in which he referred to the FSB as "the country's new nobility". According to the authors – undoubtedly critics of the regime.

Patrushev hit the nail on the head. In their view the FSB under Putin indeed became the new elite, enjoying expanded responsibilities and immunity from public oversight and parliamentary control.

With regard to human rights it is of interest not only if the country in question has ratified international human rights conventions but even more if it observes these conventions in actual practice.

As PM Tony Blair said some years ago in a speech to US Congress :  
 "Ours are not Western values, they are the universal values of the human spirit.... The rule of law, not the rule of the secret police".

Whether a foreign service sufficiently satisfies the criteria of democratic anchorage and respect for human rights is as we all know not always easy to decide. It is quite possible that under circumstances human rights violations will occur in a country having a long-term democratic tradition.

Last year the CTIVD, the independent oversight/review Committee for the intelligence and security services, investigated the way GISS handled its foreign relations.

For the investigation a number of employees of GISS were interviewed and the researchers of the Committee delved into the archives of GISS in search of material about various operations in which foreign services were involved.

Of course as a Dutch national review body you can only see the information that lies with the Dutch GISS. A question that immediately rises is: can you do a proper investigation when you can only see one side of the cooperation? Our answer is: in our case, yes. Remember: we did not evaluate the actions of foreign services, but the handling of foreign services by the Dutch GISS. If we want to know what information GISS *received*, we can look it up in their systems. The same if we want to know what information GISS has *send* to foreign services.

In this respect the so called 'third party rule' deserves special attention. Foreign services give information on the condition that it will not be disseminated without their consent. Is an overseer a third party in this respect? Should an overseer be prohibited to look into information from a foreign service? One could argue that the rationale of the third party rule is to make sure that information is not misused and that sources are protected, and that an overseer does not use the information in this sense and therefore should not be seen as a third party. Anyway, in our investigation we were able to look into the information that the Dutch GISS received from a foreign service.

Moreover, when we evaluate the actions of the Dutch GISS, it is only fair to take into account what they knew or should have known at the time of the action. For instance: in a lot of cases it is impossible for GISS to make sure that the information received is not acquired by torture. The only question that a review body can pose then is: did they do *enough*, taking into account what they should have known at that time, to make sure that certain information is not acquired by torture ?

The Committee has established that in practice GISS often does not make the required general assessments whether a foreign service qualifies for cooperation. No structured decision making process was found. Decisions were often made on an *ad hoc* basis. For example, when a target travelled to another (less familiar) country and GISS wished to keep track of his activities, an instant decision had to be made whether the foreign service could be asked to cooperate. Such a decision would be based predominantly on the operational interests in that particular situation.

The Committee found such *ad hoc* decision-making too limited and undesirable. Therefore the Committee advised GISS to make a well-considered general assessment, not only when entering into a cooperative relation, but also to always keep a finger at the pulse of an already established relation.

It is the opinion of the Committee that GISS must first make a fundamental assessment of the extent to which the criteria set for cooperation are satisfied and that it must do so at management level and for each individual foreign service separately. Subsequently, in a concrete operational case the various operational interests involved can be examined against this general assessment. This system would do justice to both the restraints on cooperation with (certain) foreign services and daily practice in which actually cooperating with a counterpart may be essential to the adequate performance of the statutory tasks of GISS.

It is important that the decision making process and its outcome will be properly documented. Only by doing this the service will be in the position to stand scrutiny. This is the more important since quite often the decision to cooperate or not will not be an easy one.

Even intelligence services are not always in a position to look behind the curtain in order to see what is actually going on, and the less so if the operational work of an other service is involved.

And although "*in dubio abstine*" is a good rule of thumb, under circumstances there is a risk that it will be trodden upon.

May I quote the famous British judge Tom Bingham from his recent booklet *The rule of law* :  
*"Whether British officials were complicit in the use of torture by others, by encouragement, acquiescence or turning a blind eye, has yet to be investigated and decided. But it cannot be said that the UK has shown that implacable hostility to torture and its fruits which might have been expected."*

It is in the interest of national security to keep the lines of communication open with all foreign services, but at the same time the utmost restraint should be exercised in cooperating with "unsafe" services.

In his book Tom Bingham referred to Prime Minister Gordon Brown, paraphrasing Cicero's *Salus populi suprema est lex* in saying :

“The first priority of any Government is to ensure the security and the safety of the nation and all members of the public”.

But, as Bingham puts it :

“A preferable view to Cicero's, perhaps is that attributed to Benjamin Franklin, that ‘he who would put security before liberty deserves neither’. We cannot commend our society to others by departing from the fundamental standards which make it worthy of recommendation”.

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