

Consultation input for the Wet op de inlichtingen- en veiligheidsdiensten

The Dutch government has proposed a new intelligence bill. Having an open and transparent debate on this topic is something I encourage and I would like to take the opportunity to share my thoughts on the proposal via the Internet consultation.

Mass Surveillance (bulk interception)

The proposal to intercept communication in bulk should be withdrawn by the Dutch government. Collecting communication data at a large scale undermines the human rights of individuals. These rights are of fundamental importance in a constitutional democracy. Mass surveillance via bulk interception violates human rights, in particular privacy, the right to protection of personal data and freedom of speech.

A government should protect individuals against such violations. Nevertheless in exceptional situations it might be necessary and proportionate to infringe on these rights by the government in pursuance of a legitimate aim, such as national security. If such an exception would emerge, the measure should be specifically aimed at targets against whom a concrete suspicion is held. Collection, interception and analysis must exclude internet messages, communication and data of individuals for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with crime or national security threats. With a three-step collection-filter-analyse approach this still holds true.

The societal costs of mass surveillance exceed the returns. So far, governments have failed to demonstrate the necessity of mass surveillance. The Explanatory Notes of the proposal state that the MIVD and AIVD have to catch up with technological developments and so it appears, that the means justify the ends. This is unacceptable in a democracy. Without a concrete need that can be demonstrated in a transparent manner, restrictive measures – such as the Wiv proposal – should not be adopted. Research into mass surveillance shows that interception of data of individuals who are not suspected is ineffective. See for example the report of the White House's Privacy and Civil Liberties Oversight Board. Instead of introducing these disproportionate restricting measures, the Dutch government should protect its citizens against human rights violations. The proposal suggests public-private cooperation and mandatory decryption and transfers of data by private entities to the intelligence services. This leads to the undesirable situation where commercial parties are forced to assist in mass surveillance and push their costumers into the surveillance dragnet.

The United States of America (US) is often pointed to as a country that has a more repressing surveillance regime, and this is true with regard to surveillance on foreigners and the ultra vires surveillance activities of the National Security Agency (NSA) that were exposed by whistleblower Edward Snowden. These activities are

being challenged in US courts as we speak.

As far as the constitutionality of the proposed intelligence gathering and sharing under US law is concerned, it is highly doubtful whether this will pass the fourth amendment test in the US. If the US government would propose such dragnet surveillance for their own citizens – as the Dutch government is doing for Dutch citizens in this proposal– it is likely to be held unconstitutional.

Collaboration between secret services

Intelligence services collaborate at a global scale. The past years multiple conspiracies of intelligence services have come to light, including nine eyes, in which the Dutch take part. This knowledge cannot be ignored in the drafting process of new legislation. Four important points should be taken into account:

Firstly, Other intelligence services have an interest in the Dutch having extensive powers, this includes NSA and the British GCHQ. The latter advised the Dutch intelligence services on 'legislative issues' that relate to mass surveillance in 2009. The Dutch legislator should prevent that the intelligence position is becoming a goal in itself without evaluating the necessity of having such a position. The idea of competing with other Nations over measures that encompass severe human rights infringements is unacceptable.

Secondly, measures that infringe on human rights have to meet the criterion of necessary in a democratic society as put forward by the European Convention on Human Rights. This treaty guarantees minimum safeguards to human rights protection in the Member States. However, because of the Dutch constitutional structure, this treaty provides effectively maximum protection in case of restricting measures for the aim of national security. Taking the requirements seriously is therefore pivotal to human rights protection in the Netherlands. The proposal allows for a culture of extensive data exchange between the MIVD and/or AIVD and foreign intelligence services. The question is for which democratic society the data processing is necessary and whether the entities that are responsible for approval and oversight on the powers, are capable of making this assessment. It is likely that these entities do not want to question matters touching upon national security in another State. This renders the safeguards ineffective.

Thirdly, the proposal encompasses the authority to collect, filter and analyse internet traffic, but also the authority to share this information with foreign intelligence services right after collection and prior to the assessment of the proportionality and necessity of the further data processing. It is therefore impossible for the data exchange between the Dutch AIVD and/or MIVD and foreign intelligence services to be proportionate.

Lastly, Government action that restricts the enjoyment of human rights must be foreseeable and the individual should be granted an effective remedy to his case. The current international practice of 'I'll spy on your citizens, if you'll spy on mine' deprives individuals of an effective remedy and cannot meet the criteria of

foreseeability

Oversight

Without effective and complete oversight safeguards have little meaning. The proposal grants the minister – member of the executive branch of the government – powers to override the judgment of the better-equipped oversight committee on the lawfulness of the interception. When the minister disregards the opinion of the oversight committee the Parliament is asked to decide on the legitimacy of the interception. This needlessly politicises the oversight on human rights infringements. In a democracy under the Rule of Law an independent oversight committee or judge should assess the legitimacy of restricting measures.

I truly hope the Dutch legislator takes the input of all submissions into consideration and takes a leading role in protection human rights and the Rule of Law.

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