

**A review committee acting as an jurisdictional body.
The new role of the Belgian Committee within the framework of
reviewing special intelligence methods**

Quite astonishingly, the Belgian State Security service historically was not authorized to use the traditional intelligence service tools against its targets, such as communication interception, covert bugging and front companies. Until now, this intelligence service had to rely primarily on human intelligence. Or to quote Mr. Alain Winants, Administrator-General of State Security in Jane's Intelligence Review in January 2010: *"We were working in the Stone Age (...) It was odd that we had no special methods in the 21st century, in a city like Brussels"*.

Very recently, a bill on intelligence gathering methods has been passed by the Belgian parliament that should give the Belgian intelligence services extensive powers as from September 2010. This legislation created three categories of intelligence gathering methods: ordinary methods (such as observations in public places), special methods (such as observations with the help of technical resources) and exceptional methods (such as violating the privacy of correspondence, telephone tapping and fictional identities).

The Standing Committee I emphasises the great importance of this legislation, which, in fact, it has been insisting upon for several years now in its recommendations. This legislation should finally provide State Security – as well as its military counterpart, the General Intelligence and Security Service – the possibility of employing effective resources against serious threats to our democratic system. At the same time, the Standing Committee I believes that this new legislation has struck a good balance between, on the one hand, the interests of the safety of our democratic system, and on the other hand, the rights and freedoms of citizens.

This balance is reflected in many aspects of the legislation. But it is not my intention to go into too much detail today, with time being too short. In the following minutes I want to discuss a specific topic that particularly concerns us, namely the control of these special and exceptional methods. Since, the powers of the Standing Committee I have also been significantly extended by this new legislation.

Supervision of the new legislation is exercised at two levels: firstly, at the level of a yet-to-be-established “administrative commission” and subsequently, at the level of the Standing Committee I.

First, a few words about the administrative commission. This commission is entrusted with the task of controlling the legitimacy, subsidiarity and proportionality of the special and exceptional methods. Note, however, that the commission itself does not have the power to grant the authorisation to employ certain methods. This power was given to the intelligence services themselves. The commission supervises the granted authorisations and the implementation of current methods. Use of the methods (as well as their extension or renewal) is subject to conditions and stipulations laid down in advance. Though it is true that this commission is an ‘administrative’ authority, it acts completely independently. To underline this independence, it is funded via a subsidy granted by the Belgian Senate. Based on the same concern, it has been decided to appoint magistrates as members of this commission. These commission members have been given sufficient legal powers to perform their control duties. For example, they may enter all premises where intelligence is gathered or stored or even appropriate all useful documents and summon members of the intelligence services concerned to a hearing.

More than the administrative commission, I want to discuss the final provision of this new legislation, namely the *a posteriori* review exercised by the Standing Committee I. Our Committee will – and this is new – act in this as a jurisdictional body. In order to avoid any confusion, I would like to add that the term *a posteriori* is misleading. It only covers the meaning insofar as it means that the Standing Committee I is never involved in the assignment of a method. It does not imply, however, that the Committee may only intervene after a method has been suspended. It may intervene from the time of the authorisation, over the course of the application of the method, until years later after its application.

The new power of the Standing Committee I consists of ‘supervising’ the special and exceptional methods. The Committee has also acquired another important power, namely ‘advising’ criminal courts about the legitimacy of evidence in criminal cases submitted by the intelligence services. But I will not go any further into that and will restrict myself to the new review powers.

In concrete terms, the Standing Committee I exercises this review by judging on the legality of the decisions with regard to special and exceptional methods as well as on the compliance to the principles of proportionality and subsidiarity. Therefore, the review assignment exercised by the Standing Committee I always includes a test of

legality and never an assessment of opportunity. However, one must not lose sight of the fact that the monitoring of the proportionality and subsidiarity requirement, just as the various formal requirements to be met by such an authorisation to use certain methods, are a part of the test of legality. For the actual interpretation of these concepts, the Standing Committee I draws inspiration from the rich jurisprudence of the European Court of Human Rights.

If the results of this legality test are negative, the Committee will forbid the further use of the method in question. In addition, they must also forbid the exploitation of the intelligence obtained, if any, and shall order that this intelligence be destroyed. But the reverse situation is also possible. In cases where the administrative commission had suspended a method (for example, because it appeared to be illegal), the Standing Committee I may of course confirm this suspension, but it may also cancel it so that the method can be used again.

The Standing Committee I may be entrusted with a case in various ways. Firstly, it can be involved by two players: (a) by the Privacy Commission and (b) by any complainant who can demonstrate a personal and rightful interest. But – and this is naturally important – it may also open up a case at its own initiative. In addition, the Committee becomes automatically involved in two situations: firstly, when the administrative commission has suspended a special or an exceptional method because it believes this method to be illegal, and secondly, when the competent minister has taken a decision due to the lack of timely advice from the administrative commission.

The Standing Committee I also has extensive possibilities and powers to assess the submitted dossiers. For example, the Committee has the right to examine the complete dossiers of the intelligence services and of the administrative commission. Moreover, the Committee can demand that all additional information be provided to it. The services in question are obliged to comply with such a demand forthwith. Within the framework of its supervisory role, the Standing Committee I may also entrust investigative tasks to the Investigation Service I (which is not obvious for a jurisdictional body). The investigators of the Committee may therefore make substantive observations at any place, always enter the premises where the intelligence agents perform their duties, take possession of documents and even demand the assistance of the public authorities.

Moreover, the Standing Committee I is also entitled to hear the members of the administrative commission and the intelligence services. The members of the intelligence services are bound to disclose to the Standing Committee I the secrets that they know of, even if those secrets relate to an ongoing criminal or judicial inquiry. The sole condition in this case is that the competent magistrate must be consulted in advance. The complainant, if any, and his lawyer shall be also summoned for hearing by the Standing Committee I.

The Standing Committee I is assigned a period of time within which it must arrive at a decision. It is important that as long as the Standing Committee I has not given a decision, the method may, in principle, continue to be used. Finally, it must also be noted that no appeal is possible against decisions of the Standing Committee I.

Since the landmark ruling in the *Klass* case, which you are possibly aware of, the European Court of Human Rights has always kept a close watch on the presence of adequate and effective guarantees to prevent possible misuse under the disguise of 'the protection of national security'.

In a recent case against Moldavia, this Court has described as follows the way in which the use of intrusive measures must be supervised and I quote: '*the body issuing authorisations for interception (in other words, the yet-to-be-established "administrative commission") should be independent and (...) there must be either judicial control or control by an independent body (this is the Standing Committee I) over the issuing body's activity.*' I hope that you will agree with me that the new legislation with its *a priori* and *a posteriori* control completely satisfies, at least in this area, the strict requirements of the ECHR.

In theory, anyhow. Whether the targeted result will actually be achieved in practice, will depend on the resources made available to these services and on the extent of synergy which must develop between the administrative commission and the Standing Committee I and – certainly also – the intelligence services.