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Body Hague Court of Appeal Date uitspraak27-10-2015Datum publicatie27-10-2015
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Civil law jurisdictions
Special features appeal interlocutory proceedings
Content Display

May the AIVD and the MIVD telephone tapping (tapping) with the participation of a lawyer? They may pass this information to the prosecution? Articles 6 and 8 ECHR.
VindplaatsenRechtspraak.nl

Pronunciation

COURT THE HAGUE

Section of Civil Law

Case number: 200 174 280/01

Property damage / docket court: C / 09/487 229 / KG ZA 15-540

judgment of October 27, 2015

on

the State of the Netherlands,

its seat in The Hague,

hereinafter: the State,

appellant in the main appeal,

respondent in the cross-appeal,

counsel: C. M.. Bitter,

against

1 [Name]

residing at [place]

2 [Name]

residing at [place]

3 [name]

residing at [place]

4 [name]

residing at [place]

5 [name]

residing at [place]

6 [name]

residing at [place]

7 [name]

residing at [place]

8 [Name]

residing at [place]

9 [name]

residing at [place]

10. [name]

residing at [place]

11 [name]

residing at [place]

12 [name]

residing at [place]

13 [name]

residing at [place]

14 [name]

residing at [place]

15 [name]

residing at [place]

16 [name]

residing at [place]

17 the Dutch Association of Defence Counsel,

established in Goirle,

hereinafter referred to as the NVSA,

respondents in the main appeal,

hereinafter also referred to collectively as [X] et al

counsel: Ch.. Samkalden in Amsterdam

and against

the legal person under Belgian law Council of European Bars,

located in Brussels, Belgium,

hereinafter referred to as the CCBE,

respondent in the main appeal,

appellant in the cross-appeal,

counsel: O.R.. Hard Pants Ammerstol The Hague.

The proceedings

When exploits of July 27, 2015 the State appealed against the ruling of the judge in the Court of The Hague of July 1, 2015, highlighted between [X] and others as plaintiffs, the State as the defendant and the CCBE as an intervening party. This exploits the State has four complaints raised against the contested judgment. [X] cs have fought in response to the allegations. The CCBE has also contested the allegations in response and set up under the leadership of two complaints cross-appealed. The State has to reply in the cross-appeal challenged the allegations in the cross-appeal. On September 23, 2015, the parties argued the case before the court, the State through his lawyer, Of Wine Earthen cs by their lawyer and by mrs. [...] And [...], lawyers in Amsterdam, and the CCBE by her lawyer. The pleadings whose attorneys have been served submitted to the court. [X] and others and the CCBE have on that occasion still (partly the same) productions compromised. Finally judgment requested.

Assessment of the appeal

1.1
Since no complaints are directed against the facts has shown, the judge in 2.1 to 2.12 of its award goes to the court of these offenses. The issue in this case to the next.

1.2
Respondents 1 to 16 are working as a lawyer in the office Prakken d'Oliveira Amsterdam. The NVSA is an association that represents the interests of the defense in criminal cases, according to its statutes. Almost all specialized criminal lawyers in the Netherlands are members of the NVSA.

1.3
Pursuant to article 25 of the Intelligence and Security Services Act 2002 (Wiv 2002), the General Intelligence and Security Service and the Military Intelligence and Security Service (hereinafter the "Services") responsible (among others) to listen in on phone conversations (' tapping). Paragraph 1 of Article 25 reads as follows:

The services are authorized to intercept with a technical device, receive, record and monitor any kind of conversation, telecommunication or data transfer by means of an automated work, irrespective of where this takes place. The powers referred to in the first sentence include the power to make encryption of conversations, telecommunication or data undone.

1,4
Bleeding through the services of telephone conversations in which a lawyer takes part can occur in the following situations: (a) if the phone a lawyer tapped because it is itself the subject of research, (b) if the phone a lawyer tapped though This is not a subject of research of services and (c) if a person other than the lawyer object of research, the calls of those overheard another and thus be absorbed his possible conversations with a lawyer. The situations (a) and (b) are referred to by the term "direct pull" situation (c) is called "indirect tapping '.

1.5
Article 38, paragraph 1, ISS Act 2002 reads as follows:

If during the processing of information by or on behalf of a service shows data that may also be of interest to the investigation or prosecution of criminal offenses, can it by the relevant Minister or on its behalf, the head of the service, without prejudice to the case under a legal obligation, receive written notification to the appropriate officer of the public prosecutor.

1.6
The Supervisory Commission on the Intelligence and Security Services (CTIVD) is based on Article 64 Wiv 2002 (among others) in charge of supervising the legality of the implementation of what has been laid down by or pursuant to this Act, solicited and

unsolicited inform and advise the responsible ministers (Interior and Defence) and advising the ministers concerned on the investigation and assessment of complaints.

1.7
Respondents 1 to 16 have filed a complaint on April 8, 2014 by the Minister of the Interior and Kingdom Relations (hereinafter: the Minister) about the actions of the General Intelligence and Security Service (AIVD), which would breach the tapping of telephone conversations make their privilege as lawyers. They also have in this letter, to introduce a system of caller ID.

1.8
CTIVD in response to this complaint on September 16, 2014 issued advice to the Minister. The Minister in his letter of December 15, 2014, followed the advice of the CTIVD and partly unfounded and dismissed the complaint partially upheld. The complaints were unfounded in so far as it did on tapping directly. The complaints were upheld because, as far as it comes to tapping indirectly, within the AIVD was no written policy regarding the development of telephone calls and e-mails between lawyers and clients / third parties and as more such conversations were developed by the AIVD than was necessary. The request to introduce a system of number recognition dismissed the Minister.

1.9
[X] et al state that the reaction of the Minister on the complaint that confidential communication (among others) the lawyers of Prakken d'Oliveira is intercepted. According to them, makes the State thereby infringing the privilege of lawyers. [X] and others claim that the State is condemned, in short, tapping and developing any form of communication and to strike with lawyers and that the State is prohibited from the information acquired by breaching the privilege to to hand over the prosecution.

1:10
The CCBE (short for "The Council of Bars and Law Societies of Europe") is an association under Belgian law which represents the interests of its members, the European Orders of Lawyers. The CCBE intervened in the procedure identical claims as [X] cs against the State, provided that it has stated its advanced by stating that the ban should apply in respect of all lawyers within the meaning of Article 1 of the Directive the Council of March 22, 1977 to facilitate the effective exercise by lawyers of freedom to provide services (Directive 77/249 / EEC).

1:11
The judge largely for the claimant. He ordered the State to take effect in six months after service of tapping the judgment (directly and indirectly), receiving, recording, playback and developing to cease any form of communication to and with lawyers and to keep it, unless the State previously has taken measures allowing the use of special powers can be assessed by an independent body which in any case has the power to prevent or stop the deployment. He also has the State banned with immediate effect to revenues obtained from providing the use of special powers involving communication and change beneficiary lawyers listened to the prosecution without prior to that distribution has taken place an independent test on the legality of that provision, in which testing must be assessed whether the information is covered by the privilege and if so, under what conditions these may be

provided.

1:12
The considerations of the court may, where appeals of interest are summarized as follows. Eavesdropping on conversations between lawyers and their clients violates the privilege of the lawyer. Which touches infringement of Article 8 ECHR (right to respect for private and family life) and Article 6 of the ECHR (right to a fair trial). However, this privilege is given include the jurisprudence of the ECHR, not absolute. So it is not true, as the CCBE argues that restrictions are not possible to change the law at all. Given the serious consequences of (possible) infringements of the right of non-lawyers, and because abuse in individual cases is potentially easy, it is highly desirable that independent supervision of the exercise of the special powers, while the supervisory board include the must have jurisdiction to terminate or prevent the exercise of those special powers against attorneys. Under the Wiv 2002, there is no independent body which has such power, while the State no objections to independent preventive testing has put forward. The existing policy is therefore unlawful towards all lawyers within the meaning of Directive 77/249 / EEC, at least insofar as they work in the Netherlands. The State gets six months the opportunity to still enter the required independent key. That test does not in all cases be made prior to the exercise of special powers. By indirectly tapping will not be clear in advance in all cases where the available information likely to fall within the privilege. Nor is required that the test carried out by a judge. Also passing on the information obtained from the use of special powers against nondisclosure is unlawful if no independent verification has been made. That review should be assessed whether the information is covered by the privilege and if so, under what conditions these may be provided.

1:13
The Minister in a letter dated July 27, 2015 to the House a response to the verdict of the court. In that letter, the Minister, on behalf of the Minister of Defence, that the government wants to provide some form of independent review by the tapping of lawyers, the need for a legislative change is necessary and how the independent review will be decorated topic consultations within the government.

in the main appeal

2.1

The objections of the State against the judgment of the court are largely down to the following:

(i) the court wrongly required that must be provided with direct and indirect tapping an independent test;

(ii) the period of six months is too short for the creation of laws governing such an independent test;

(iii) the court has wrongly given a judgment on what should constitute an independent review;

(iv) the court erred ban for providing information to the prosecution without independent test do go immediately.

2.2
In ground one does the State objection (i) further. The State believes that the judge wrongly shall require that when tapping (directly or indirectly) of lawyers must have an independent test. The judge leads wrongly from the judgment of the ECHR of November 22, 2012, no. 39315/06 (Telegraph). There are important differences between that case, which concerns the protection of sources of the journalist, and the right of the lawyer. The case law of the ECHR shows that checks later, if effective, may offer sufficient safeguards. Furthermore, the judge failed to recognize that the State belongs in this regard discretion, and that there can only be room in these interim proceedings for a preliminary injunction if there is manifestly unlawful act. There is none, at most may be the case law of the ECtHR concluded that an independent review 'desirable', according to the State.

2.3
The court finds that no dispute is that the communication between a lawyer and his client is under the protection of Article 8 ECHR. The ECHR has confirmed this several times, including in its judgment of December 6, 2012, no. 12323/11 on Michaud t. France. In that judgment, the ECHR that the correspondence between lawyer and client a "privileged status where confidentiality is Concerned" and that the particular importance it attaches to the risk that the "proper administration of justice" is hit. The European Court found further:

"It is true that, as previously Indicated, legal professional privilege is of great Importance for both the lawyer and his client and for the proper administration of justice. It is without a doubt one of the fundamental principles on-which the administration of justice in a democratic society is based. It is not, However, inviolable (...) "(underlined by the Court)

The ruling on Michaud did not concern the tapping of calls from a lawyer. The case Kopp t. Switzerland on March 25, 1998, no. 13/1997/797/1000 had though. It considered the ECHR:

"72. (...) Secondly, tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a "law" that is Particularly precise. It is essential to have clear, detailed rules on the subject, Especially as the technology available for use is Continually becoming more sophisticated (....).

In that connection, the Court by No Means seeks to mini-mise the value of some of the safeguards built into the law, such as the requirement at the relevant stage of the proceedings That the prosecuting Authorities' telephone-tapping orders must be approved by the President of the Indictment Division (....), who is an independent judge, or the fact that the applicant was informed Officially That his telephone calls had been intercepted (...).

73. However, the Court disc more a contradiction between the clear text of legislation-which Protects legal professional privilege When a lawyer is being monitored as a third party and the practice followed in the present case. Even though the case-law HAS established the principle, All which is more about generally accepted, that legal professional privilege covers

only the relationship between a lawyer and his clients, the law doesnâ Clearly state how, under what conditions and by Whom The distinction is to be drawn between matters Specifically connected with a lawyer's work under instructions from a party to proceedings and Those Relating to activity Other than that of counsel.

74. Above all, in practice, it is, to say the least, astonishing thatthis task shouldering be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge, Especially in this sensitive area of the confidential relations between a lawyer and his clients-which directly concern the rights of the defense. "(emphasis Court)

2.4
Of the cases relating to the interception of telephone calls in which no lawyer was involved, among other things, the Kennedy t. United Kingdom May 18, 2010, no. 26839/05 and Weber and Saravia t. Germany on June 29, 2006, no. 54934/00 important. The European Court found in the case of Kennedy:

"167. The Court recalls That It has previously Indicated tat in a field where abuse is Potentially so easy in individual cases and could have Such harmful Consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge (...). . In the present case, the Court highlights the extensiveness of the forum-IPT to examine any complaint of unlawful interception. Unlike in many other domestic systems (....), Any person who suspects That his communications have been or are being intercepted May apply to the IPT (....). The Jurisdiction of the IPT does not, Therefore, depend on notification to the interception subject thatthere HAS BEEN an interception of his communications. The Court emphasises That the IPT is an independent and Impartial body, HAS ADOPTED-which its own rules of procedure. The members of the tribunal must hold or have held high judicial office or be experienced lawyers (see paragraph 75 above). In undertaking its examination of complaints by Individuals, the IPT HAS access to closed material and HAS the power to require the Commissioner to providence it with any assistance it thinks fit and the power to order disclosure by Those Involved in the-authorization and execution of a warrant or all documents it considers relevant (....). In the event That the IPT finds in the applicant's favor, it can, inter alia, Quash any interception order, require destruction of intercept material and order compensation to be paid (....). The publication of the IPT's legal rulings Further Enhances the level of scrutiny afforded to secret surveillance activities in the United Kingdom (....). "

Given these safeguards were in place in the United Kingdom, the ECtHR held that Article 8 of the ECHR had not been violated. Even in Weber and Saravia came the ECtHR concluded that it was satisfied with the conditions of Article 8 of the ECHR because the eavesdropping was subject to independent oversight:

"106. The Court reiterates That When balancing the interest of the respondent State in protecting its national security through secret surveillance Measures against the seriousness of the interference with an applicant's right to respect for his or her private life, It has consistently Recognized That the national Authorities enjoy a fairly wide margin of appreciation in choosing the Means for Achieving the legitimate aim of protecting national security (.....). Nevertheless, in view of the risk That a system of secret surveillance for the

protection of national security May under mine or even destroy democracy under the cloak of defending it, the Court must be satisfied thatthere exist adequate and effective Guarantees against abuse (...). . This assessment depends on all the Circumstances of the case, zoals the nature, scope and duration of the possible Measures, the grounds required for ordering them, the Authorities competent to Authorise, carry out and Supervise them, and the child or remedy provided by the national law (....). "(Underlined by the Court)

and

"117. Axis regards supervision and review or monitoring Measures, the Court notes That the G 10 Act provided for independent supervision by two bodies-which had a comparatively significant role to play. Firstly, there was a Parliamentary Supervisory Board-which consisted of nine members of parliament, members of the opposition-including. The Federal Minister Authorising monitoring Measures had to report to this board at least every six months. Secondly, the Act established the G 10 Commission, surveillance-which had to Authorise Measures and had substantialism power in relation to all stages of interception. The Court observes tat in its judgment in the Klass and Others case (....) It found this system of supervision, How many followers Remained Essentially the same under the Amended G 10 Act at issue here, to be zoals to keep the interference resul ting from the Contested legislation to what was "Necessary in a democratic society". It sees no reason to reach a different conclusion in the present case. "(Emphasis Court)

In the case Klass et t. Germany, which matter not specifically related to the interception of lawyers, considered the ECHR:

"5.2 (...). As regards the implementation of the Measures, an initial control is Carried out by an official qualified for judicial office. This official examines the information obtained before transmitting to the competent services Such information as May be used in accor dance with the Act and is relevant to the purpose of the measure; he destroys any other). (underlined *intelligence That May havebeen Gathered* (see paragraph 20 above by the Court)

(...)

56. Within the system of surveillance established by the G 10, judicial control was excluded, being Replaced by an initial control effected by an official qualified for judicial office and by the control provided by the Parliamentary Board and the G 10 Commission. The Court considers that, in a field where abuse is Potentially so easy in individual cases and could have harmful Such Consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.

Nevertheless, having regard to the nature of the supervisory and other safeguards provided for by the G10, the Court Concludes That the exclusion of judicial control does not Exceed the limits of what may be Deemed Necessary in a democratic society. "(Emphasis Court)

: 2.5

In the case of De Telegraaf t. Netherlands (ECtHR November 22, 2012, No. 39315/06.), Which concerned the tapping of journalists in order to discover the identity of their source, considered the ECHR:

"97. The present case is characterised Precisely by the targeted surveillance of journalists in order to qualification from whence theyhave obtained Their information. Therefore it is not possible to apply the same reasoning as in Weber and Saravia.

98. The Court HAS Indicated, When reviewing legislation governing secret surveillance in the light of Article 8, that in a field where abuse is Potentially so easy in individual cases and could have harmful Such Consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge (....). However, in both cases the Court was prepared to accept as adequate the independent supervision available. In Klass and Others, this included a practice or seeking prior consent to surveillance Measures of the G 10 Commission, an independent body chaired by a president who was qualified to hold judicial office and-which more over had the power to order the immediate termination of the Measures in question (....). Kennedy (loc. Cit.) The Court was impressed by the interplay between the Investigatory Powers Tribunal ("IPT"), an independent body composed of persons who held or had held high judicial office and experienced lawyers-which had the power, among other things, to Quash interception orders, and the Interception of Communications Commissioner, likewisethat a functionary who held or had held high judicial office (....) and who had access to all interception warrants and applications for interception warrants (....).

99. In contrast, in Sanoma, an order Involving the disclosure of journalistic sources was've given by a public prosecutor. The Court Dismissed as inadequate in terms of Article 10 the involvement of an investigating judge, since his intervention, CONCEDED voluntarily by the public prosecutor, lacked a basis in law and his advice was not binding. Judicial review after the fact could not cure thesis failings, since it could not preventinfo the disclosure of the identity of the journalistic sources from the moment When this information came into the hands of the public prosecutor and the police (....).

100. In the instant case, as the Agent of the Government Admitted at the hearing in reply to a question from the Court, the use of special powers would appearacne to have been Authorized by the Minister of the Interior and Kingdom Relations, if not by the head of the AIVD or as a subordinate AIVD official, but in any case without prior review by an independent body with the power to preventable or terminate it (section 19 of the 2002 Intelligence and Security Services Act, see paragraph 51 above).

101. More Over, review post factum, Whether by the Supervisory Board, the Committee on the Intelligence and Security Services of the Lower House of Parliament or the National Ombudsman can not restore the confidentiality of journalistic sources once it is destroyed.

102. The Court finds osmanthus That the law did not providence safeguards appropriateness to the use of powers of surveillance against journalists with a view to discovering Their journalistic sources. There HAS Therefore leg a violation, whether Articles 8 and 10 of the

Convention. "(Emphasis Court)

2,6
These decisions leave no other conclusion than that, according to the ECHR, a form of independent oversight must be provided even when tapping people who do not fall under the legal privilige. This conclusion suffices to uphold the judgment of the court, as it has been established that such independent oversight is lacking.

2.7
The Court considers that the requirements that (directly or indirectly) tapping a lawyer must comply not be lower than the requirements for tapping non-nondisclosure. The ECtHR points to the probability that the communication between lawyer and client a 'privileged status', and that by intercepting a lawyer not only the respect of the private life of the lawyer but also the good administration of justice could be compromised. The Court observes notes that the privilege was granted to the lawyer for the public interest to which it is involved that one can seek the assistance of a lawyer (HR June 22, 1984, NJ 1985, 188) and lest anyone fear that certain facts will be known, it will be retained to enlist the help of a lawyer (HR November 11, 1977, NJ 1978, 399). Against this background, it is vital that those who are or are turning consider a lawyer to do so, there can rely on the confidentiality of their communications with that lawyer is in principle guaranteed and that it only in special cases and under supervision an independent body capable of being impaired. The court is of the opinion that although the right to protect sources of the journalist is not comparable in all respects with the privilege of the lawyer, there is no reason to foresee tapping a lawyer less secure.

2.8
The foregoing means that the court rightly judgment has come directly and indirectly tapping of lawyers is only acceptable if in independent monitoring referred to above is provided. He also has to consider that such independent oversight is lacking. That is between the parties, moreover not in dispute. CTIVD admittedly has a supervisory role and can adjust for that reason independent inquiry into how the ISS Act 2002 (article 78), but this can only result in the release of a monitoring report to the Minister (Article 79). In addition, the CTIVD can ask the Minister and unsolicited advice and she has an advisory role in the handling of complaints (Article 64 paragraph 2). Any direct involvement in the tapping of lawyers CITVD does not, for example, they also did not have the authority to (do) tapping a lawyer terminate. The fact that be observed in policy certain safeguards within the services at tapping lawyers and the elaboration of intercepted material does not detract from this. It does, after all, is not a form of independent oversight.

2.9
It is not for the court to make a ruling on the question of how the required independent oversight there should look like and what requirements it must meet. For assignment of the claim is not necessary, there is sufficient independent monitoring is lacking as provided by the ECHR at present. Moreover, can only be given a judgment on the independent oversight as it is known how it looks. As is apparent from the above-cited judgments of the ECHR follows it comes to the question of whether adequate independent oversight exists to assess a system of coherent measures and powers. The State shall, on the basis of the criteria developed in the case law of the ECHR, it should provide independent oversight shape. In addition, he will need to attach particular importance to the special position of the lawyer

(previously pointed out in 2.7). This does not mean that the court has rightly deduced from the case law of the ECHR that independent oversight in not conceivable sense intended by the ECHR unless the supervisory board at least has the power to (directly or indirectly) tapping of lawyers to prevent or terminate. This obviously follows from the judgment on Telegraph, and the Court sees no reason to apply a different standard for tapping a lawyer. Unlike the State alleges, the judge also did not disregard that checks later, if effective, may offer sufficient safeguards. Rather, the court has stated explicitly that the independent test, not in all cases prior to having to take place, the use of special powers (paragraph 4.14), provided that the supervisory body has the power to prevent the tapping of lawyers or terminate (paragraphs 4.13 and 4.14).

2:10
The State also argued that the court had to make do with a cautious assessment, as a preliminary injunction application in this case could only be made if there is manifestly unlawful act. That argument fails. The ban pronounced by the judge on the tapping of lawyers and relaying the information to the prosecution obtained from these taps do not imply that the ISS Act 2002 or its parts must be rendered inoperative or ineffective explained. It prohibits only a particular case, directly or indirectly tapping of lawyers, limits to the exercise of the competence which the services under Articles 25 and 38, ISS Act 2002, borders that may engage the services themselves politically in eight . Therefore the criterion that there must unequivocally unlawful are not applicable. Furthermore, while it is true that States have a relatively wide discretion in adopting the measures necessary for the protection of national security (see Weber and Saravia above), but the law of the ECtHR follows unequivocally that this margin not so broad that can be dispensed independently monitor the tapping of lawyers. There can also be no doubt that the requirement for independent oversight in this case is lacking.

2:11
The complaint is finally challenges the finding of the court that his judgment applies to all lawyers within the meaning of Directive 77/249 / EEC. According to the State is unclear and unenforceable. The ban should be restricted to lawyers registered in the Netherlands. This complaint is not, as this would mean tapping in the Netherlands active lawyers registered in another EU Member State with fewer safeguards surround than tapping in the Netherlands is registered lawyers, without a clear justification for that . This violates the right to freedom of establishment under Article 49 TFEU and the scope of Directive 77/249 / EEC. Moreover, the CCBE the lawyer has been unchallenged during the hearing that all lawyers are permitted to operate in the European Union are registered with the CCBE and that can be through a publicly accessible website examines the lawyers are. The Court therefore considers unlikely that the ban is unenforceable by the court.

2:12
Grief 1 fails.

3.1
With second complaint the State argues first that the court material to create a commandment given legislation. And he is not entitled to the opinion of the State. Moreover, a command to create a system change are no device which can be given in summary proceedings.

3.2
This complaint fails. The judge has no commandment imposed to legislation, not a prohibition amounts to material on that. He has the State nor given an order to implement an accounting change. The judge has the tapping of lawyers and providing tapped information prohibited by the prosecution, it does not meet the requirement of adequate independent oversight. This prohibition does not apply if the State sufficiently independent oversight in life raises goes without saying, but does not mean that the judge directly or indirectly imposed an injunction to legislation. Moreover, it is the opinion of the court, although highly desirable that legislation is being established in this area, but that is not strictly necessary (see Note 3.3).

3.3
The State further complains in this complaint that the period of six months is too short for the creation of legislation. Even with that argument, the State is not successful. The court is there in the first place not convinced that the required independent oversight can be achieved only through legislation. The State also motivates not at all why not, at least as an interim measure pending final legislation would be sufficient (published) policy on how the services will use their powers under Articles 25 and 38 Wiv 2002. In the second place, the judgment of the court of the State can not have come as a surprise. The State may already much earlier in the jurisprudence of the ECtHR and have concluded that insufficient safeguards have been taken under the ISS Act 2002 for tapping (at least) lawyers. For that reason, the court sees insufficient reason to grant the State a period longer than six months from the notification of the judgment of the court.

3.4
Among 4:19 and 4:20 the State formulated a number of questions about the details of the review to be conducted by the independent body. [X] cs rightly object that the State these questions themselves, on the basis of the case law of the ECtHR has developed criteria, must answer to the shaping of the necessary independent oversight. The State can not reasonably complain first that the judge is too much interference in the content of the scheme design and also that he has not clarified the contents of the scheme. The judge has rightly with the sufficient, the case law of the ECtHR next, indicate minimum requirements for such a system will have to meet.

3.5
In the final of this complaint, the State complains that the judge required review by indirectly tapping is only feasible to introduce a system of number recognition, while a caller ID system would mean that no decision can be made at all between the interests of national safety and the right, which according to the State in terms of protection of national security is not acceptable. This argument also fails. The judge has to consider that finding the independent test not in all cases prior to tapping does place because it certainly will not always possible to indirectly tap. Unlike the State relies on a system of number recognition is therefore not the only possible solution, and is therefore not to see that there would be no room for balancing the protection of national security and the importance of the envisaged by the State privilege of the lawyer. [X] cs in the response on page 22 under Note 46 made a suggestion for a system of assessment by indirectly tapping, the system stalls not automatically if a meeting with a lawyer is conducted, but the information is stored and this only after an independent test of the service will be made known. That such a system would be unworkable did not

allege the State.

3.6
Grief 2 fails.

4.1
In ground 3 The State challenges the finding of the court that the State no information obtained from the tapping of lawyers should provide the public prosecution as long as no independent assessment has taken place with regard to the legality of that provision. This key represents, according to the judge that must be assessed whether the information is covered by the privilege and if so, under what conditions may be provided this information (judgment under 4.18). The State is of the opinion that, under exceptional circumstances, such as to prevent an imminent attack, or submit information to the public prosecutor should be provided, possibly even before the independent oversight is entered.

4.2
The court has previously held that the direct and indirect tapping of lawyers currently in breach of Article 8 ECHR and therefore unlawful. That the court has given the state the time period of six months to implement still in independent monitoring, does not prevent the direct or indirect tapping law even now already is illegal. The court considers that the court has rightly decided that such illegal taps obtained information can not be provided to the Public Prosecutor and that he finds the corresponding prohibitory has made effective immediately. Article 38, ISS Act 2002, which gives the power to the services to be provided to the Public Prosecutor processed data, after that the reason for that provision that it concerns information that may be relevant to the investigation or prosecution of criminal offenses. This means that by no means be ruled out that information which is obtained by tapping the services of confidential conversations between a lawyer and his client, is used in criminal proceedings. Without adequate safeguards, which lacks, is unacceptable, as it would violate one of the fundamental principles of a fair trial, in particular with Article 6 paragraph 3 c ECHR. The ECHR after all is one of those fundamental principles, recognized the right of the accused to consult unattended and out of earshot of a third with his lawyer. See Dominichini t. Italy (15943/90) under 39; Ocalan t. Turkey (46221/99) under 133; Moiseyev t. Russia (62936/00) under 209. In S t. Switzerland (12629/87) the ECtHR held:

"48. (...). The Court considers That an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) (art. 6-3-c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without Such surveillance, his assistance would lose much of its usefulness, Whereas the Convention is Intended To guarantee rights That are practical and effective (see, inter alia, the Artico judgment of 13 May 1980, Series A no. 37, p. 16, para. 33). "

4.3
Even the possibility that, except in very exceptional and clearly formulate cases, such information to the public prosecutor is passed can result in people waive to turn to a lawyer. That is contrary to the spirit of Article 6 paragraph 3 c ECHR and the ratio of paid to a lawyer

privilege. Passing on information obtained from taps to the prosecution can therefore be justified only under quite exceptional circumstances, such as the case mentioned by the State that an attack can be thwarted. However, the power of the authorities to disclose information to the public prosecutor is now not limited to such exceptional cases. Also missing at this point published policy when the services are bound and which litigants could deduce that this power will only be used in those exceptional cases.

4.4
The judge also rightly decided that the passing of information obtained from lawyers taper to the prosecution requires an assessment by an independent body, with provisions court has not decided that the key must always be made beforehand. Such a specific assessment is lacking at present. The general duties of keeping the CTIVD monitor the lawfulness of the execution of which by or held under the ISS Act 2002 is too general purpose and does not guarantee that the transmission of information to the public prosecutor each time on the basis of all the circumstances of the present case is examined by her.

4.5
That the criminal courts illegally obtained evidence produced by the prosecution beyond can leave aside does not mean that the civil courts can not ban services to provide such information to the public prosecutor. Moreover, do not always have the information obtained from the illegal to evidence, but it is also possible that the public prosecutor is informed by the services of the trial tactics of the suspect and his lawyer and there, without the court having to experience, may benefit them. Moreover it can not remove a button by the court afterwards that the risk that suspects are less likely to turn to a lawyer, if they know that may reach their conversations with a lawyer for the prosecution, there has been no independent test demon- it follows that it is an exceptional case.

4.6
The judge has rightly decided that from taps of lawyers obtained information may be disclosed only to the prosecution if, insofar as such information is covered by the privilege, will be assessed regardless of whether this is permitted. It is for the State to develop criteria by which to identify what information, in what circumstances and under what conditions should be provided to the public prosecutor. It is also for the State to shape the supervision of such benefits and to determine when consent is needed and under the exceptional circumstances (such as in emergencies where national security is at stake) with scrutiny will suffice afterwards.

4.7
Now all these safeguards fail, the court finds that the passing on of information obtained from lawyers taper to the public prosecution is unlawful. The judge has rightly banning the disclosure of this information do take effect immediately, now it is unlawful because, contrary to Article 8 ECHR obtained information that, if disclosed to the prosecution, a serious violation of Article 6 paragraph 3 leads c ECHR.

4.8
Grief three fails as well based on the foregoing.

4.9

Grief 4 has no independent meaning and requires no separate discussion.

in the cross-appeal

5.1
One complaint is directed against two considerations of the court, where the judge considers that the EU Charter does not apply and that the privilege is not absolute. According to he CCBE, the Charter does apply and the privilege is absolute, although not all communications between a lawyer and his employer are covered by the privilege. By extension, the CCBE second complaint argues that the words "with regard to the legality of that provision" should be deleted. The complaints are suitable for joint treatment.

5.2
Whether the Charter applies in this case can be left open, as it is not stated or shown that the assessment of the behavior of the State based on the Charter would lead to a different outcome.

5.3
The complaints are based for the rest on the notion that the privilege of the lawyer is absolute, but that the privilege does not extend to cases where for example the lawyer takes part in criminal acts or is informed by his client about an imminent attack. In the view of the CCBE would therefore not be assessed or allowed a breach of privilege that would never be the case, but it should be examined how far the privilege extends instead. The court is not convinced that this is something other than a war of words. Nor raises the conclusion that the approach advocated by the CCBE will lead to a different outcome in practice. The CCBE therefore has no interest in this argument. Incidentally, the court finds that the ECHR are in constant case assumes that the privilege is not absolute. The Court sees no reason to deviate.

4.5
The cross appeal fails.

concluded

6.1
Now, the complaints in the principal and the cross-appeal fail, the court will affirm the judgment of the court.

6.2
In the main appeal, the State will be condemned as the unsuccessful party in the costs of the proceedings on appeal. These include the (yet to make) subsequent costs (for which the following sentence is also an enforcement order - HR March 19, 2010, LJN: BL1116). Pursuant to Article 237, paragraph Rv remains the determination of costs is limited by the court in this case until the verdict before the costs incurred. For allocation of the statutory

commercial interest is no ground. The CCBE will be sentenced in the cost of the cross-appeal.

Decision

The Council:

in the main appeal:

- Upholds the judgment of the court;

- The State to pay the costs of the proceedings on appeal, to date on the part of [X] cs budgeted at € 711, - for disbursements and € 2682, - for salary of the lawyer, and on the side of The CCBE budgeted at € 711, - for disbursements and € 2682, - for salary of the lawyer, and provides that on such a conviction pronounced in favor of the CCBE the statutory interest after the fifteenth day of this judgment;

- Declares this judgment in respect of the legal costs enforceable;

in the cross-appeal:

- Upholds the judgment of the court;

- Condemns the CCBE in the costs of the proceedings on appeal, to date on the part of the State estimated at nil for disbursements and € 1341, - to pay the lawyer.

This judgment was rendered by mr. S.A. Boele, A. Dupain and J.J. van der Helm and delivered at a public hearing on October 27, 2015, in the presence of the Registrar.