Judgement

THE DISTRICT COURT OF THE HAGUE

Commerce Team – Provisional Relief Judge

case / roll number: C/09/487229/KG ZA 15-540

Summary proceeding judgement of 1 July 2015

In the case of

1. Marcel Franciscus van Wijngaarden,
2. Michiel Pestman,
3. Philip-Jan Schüller,
4. Liesbeth Zegveld,
5. Britta Böhler,
6. Anna Maria van Eik,
7. Göran Kimo Sluiter,
8. Cornelia Johanna Ullersma,
9. Anne Willebrord Eikelboom,
10. Channa Samkalden,
11. Tamara Mary Domitila Buruma,
12. Edward van Kempen,
13. Annebrecht Vossenberg,
14. Tomasz Jerzy Kodrzycki,
15. Hana Maria Agnes Elisabeth van Ooijen,
16. Tom de Boer,
plaintiffs sub 1, 2, 4, 5, 8, 9, 11, 12, 13, 14 and 16 residing in Amsterdam, plaintiff sub 3 residing in Alkmaar, plaintiff sub 6 residing in Haarlem, plaintiff sub 7 residing in Heiloo, plaintiff sub 10 residing in Watergang, plaintiff sub 15 residing in Bussum,
17. the association
de Nederlandse Vereniging van Strafrechtadvocaten [the Dutch Association of Criminal Defence Lawyers],
established in Goirle,
plaintiffs,
lawyer Atty Ch. Samkalden in Amsterdam,

against:

the legal entity under public law
the State of the Netherlands (the Ministry of the Interior and Kingdom Relations),
sitting in The Hague,
defendant,
lawyer Atty C.M. Bitter in The Hague,

in which intervened:

the legal entity under Belgian law,
Raad van Europese Balies [the Council of Bars and Law Societies of Europe],
established in Brussels (Belgium),
lawyer Atty O.R. van Hardenbroek in The Hague.

Plaintiffs sub 1 through 16 will hereafter also be referred to as ‘the lawyers of Prakken d’Oliveira’ and plaintiff sub 17 as ‘the NVSA’.
The defendant and the intervening third party will hereafter be referred to as ‘the State’ and ‘the CCBE’ respectively.

1. Procedural history and the incident leading to intervention

1.1. The plaintiffs had the State summoned on 28 April 2015 in order to appear on 17 June 2015 at the session of the Preliminary Relief Judge of this district court. The case was dealt with on that date.

1.2. The CCBE asked to be allowed to intervene in the legal proceedings between the plaintiffs and the State. At the hearing of 17 June 2015, the plaintiffs and the State declared that they had no objection to this intervention. The CCBE was then admitted as an intervening third party, since it made a plausible case that it had a sufficient interest in the proceeding. Furthermore, it did not appear that the requested intervention would impede the urgency required for this summary proceeding or the proper order of the proceedings in general.

1.3. The judgement is determined on this day.

2. The facts

On the basis of the documents and what was debated at the hearing of 17 June 2015, this proceeding is based on the following understanding of the facts.

2.1. Plaintiffs sub 1 through 16 work as lawyers at the law firm of Prakken d’Oliveira Human Rights Lawyers in Amsterdam

2.2. The NVSA is an association that, as appears from its articles of association, seeks (amongst other things) to promote “(…) everything that contributes to the proper functioning of a defence in criminal cases (…)” and that for this purpose, if necessary, acts in court. Almost all of the specialised criminal defence lawyers in the Netherlands are members of the NVSA.

2.3. The CCBE is an association under Belgian law that seeks to promote the interests of its members, i.e. the national *Ordes van Advocaten* (Bars and Law Societies), including the *Nederlandse Orde van Advocaten* [Dutch Bar Association] .

2.4. On 8 April 2014, Atty Pestman submitted a complaint on behalf of 22 (former) lawyers working at Prakken d’Oliveira on the basis of article 83 of the *Wet op de inlichtingen- en veiligheidsdiensten 2002* (Wiv 2002 = Intelligence and Security Services Act of 2002) to the Minister of the Interior and Kingdom Relations (hereafter referred to as ‘the Minister’) concerning the actions of the *Algemene Inlichtingen- en Veiligheidsdienst* (AIVD = General Intelligence and Security Service). This complaint relates in particular to the (direct and indirect) tapping of any form of telecommunications of and with the lawyers working at Prakken d’Oliveira. In this complaint, Atty Pestman states that the AIVD, by using its special powers based on article 25 (amongst others) Wiv 2002, violates the legal privilege of the lawyers. According to the complaint of Atty Pestman, this is both the case if these special powers are used directly against the lawyers (who themselves can be a target of an AIVD investigation), and if these special powers are used against their clients. In all of these cases, the AIVD listens to and reads the confidential phone calls and correspondence of the lawyers. In

continuity with the complaint, Atty Pestman asked the Minister to introduce a system of number recognition for the security services, such as was also introduced in 2010 for the police and judiciary. This system allows the phone conversations that are conducted by or with lawyers, via certain telephone lines, to be blocked automatically.

2.5. In response to this complaint, the *Commissie van Toezicht betreffende de Inlichtingen- en Veiligheidsdiensten* (= the Review Committee for the Intelligence and Security Services, hereafter referred to as 'the CTIVD' or 'the Committee') issued an opinion. The CTIVD - which is composed of three members who are appointed by Royal Decree upon proposal by the Lower House of Parliament and the Minister – is, on the basis of article 64 Wiv 2002, entrusted with responsibility to, inter alia, supervise the lawfulness of the implementation of Wiv 2002 and to advise the Minister with regard to complaints.

2.6. In the CTIVD's Supervisory Report number 40 (in full: Supervisory Report on the use of the tapping authority and of the SIGINT selection authority by the AIVD. September 2012 – August 2013, published on 6 August 2014), the CTIVD wrote the following:
"The Committee observes that in the context of two operations, there was transcription of conversations with persons having legal privilege. It notes that, in these particular cases, it was not a question of application of the tapping authority against a person having legal privilege, but against someone who communicated with a person having legal privilege.

The Committee has already stated in previous reports that the AIVD must be restrained in the use of special powers against persons having legal privilege. The European Court of Human Rights (…) also adopts strict review criteria insofar as persons having legal privilege form part of an investigation. Whenever the AIVD uses its special powers in these cases, the justification should explicitly devote attention to these privileges. A carefully-weighed judgement must be reached about the question whether the use of special powers with such a particular and infringing character fulfils the legal requirements imposed for this use, including those of necessity, proportionality and subsidiarity.

In the present situation, there is no application of special powers against a person having legal privilege himself. Despite this, the Committee judges that in these cases, the AIVD needs to take into account the protection that the persons having legal privilege must enjoy, when they make the decision whether or not to transcribe these conversations. It is of the opinion that in these cases the AIVD must be restrained in the transcription of such conversations. Moreover, the Committee believes that if it is in any way reasonably foreseeable that the individual involved will have contact with a person having legal privilege, for example because the role or function of the individual involved entails this, the AIVD shall have to take this into account in the justification for applying the tapping authority. The Committee finds that the AIVD failed to do so in two cases. Moreover, it believes that the transcription of these conversations was disproportionate and thus unlawful. The Committee notes that the justification of one of the underlying operations was also aimed at gaining knowledge of the conversations with persons having legal privilege. It deems this objective to have been unlawful as well.
The other objectives of this operation however, are found to be lawful by the Committee."

2.7. By letter of 15 December 2014, the Minister gave his point of view and, in accordance with the (secret) advice of the CTIVD, declared the complaint concerning the direct application of special powers (tapping, including the transcription of the recorded contents) to be unfounded, and also declared the complaint concerning the indirect application of special powers to be partially well-founded. His point of view - insofar as relevant in this case - reads as follows:
"Although the Wiv 2002 does not recognise the concept of "persons having legal privilege", the AIVD does take into account the special position of this group and additional criteria have been established alongside the guarantees that apply for every exercise of a special power (the requirements of necessity, subsidiarity and proportionality must be satisfied). The Committee monitors the lawful implementation of the Wiv 2002 and has already a number of times reviewed whether the special guarantees that apply for persons having legal privilege are being respected by the services."
In this connection, the Minister quoted from the advice of the CTIVD mentioned under 2.5 and referred to supervisory reports of the CTIVD, more specifically to the Supervisory Report number 40 mentioned in 2.6.

2.8. As appears from the quotes from the advice of the CTIVD reproduced in the letter of 15 December 2014, the CTIVD divided Prakken d'Oliveira's complaint into two complaints, each of them in turn consisting of two sub-complaints. These quotes concerning the guarantees when tapping lawyers directly and the guarantees when engaging in indirect tapping (tapping clients or third parties) and transcribing the recorded conversations, read as follows:
"The Committee finds that the AIVD is generally restrained in the use of special powers against persons having legal privilege. In 2007 the service drew up a policy for this which prescribes that in the justification for using special powers, particular attention must be paid to the fact that legal privilege is at issue. In each case it must be explicitly brought to the attention of the minister that the tap involves a person having legal privilege. In any case, for persons having legal privilege who are not a target of the service, the minister must renew his approval each month.

The Committee advises the AIVD, in order to avoid deficiencies in the future, to include more explicitly in its policy how this restraint should be given form when using special powers against persons having legal privilege. The Committee finds that this interpretation should be sought in a more profound proportionality test.

However, even if this point is made more explicit, the Committee will still have to ascertain that the service's existing policy did have the desired effect.

Therefore, the Committee is of the view that the AIVD has provided for adequate guarantees when using special powers against persons having legal privilege, at least where lawyers are concerned.

(…)

The Committee has determined that there is no (written) policy present within the service regarding the transcription of phone calls and e-mails conducted or exchanged between clients/third parties and lawyers, which have been intercepted by means of the use of article 25 Wiv 2002 against the relevant clients/third parties. Therefore the Committee believes that, at this point in time, there are insufficient guarantees with regards to the transcription of these phone calls and e-mails. It therefore deems AIVD's acts and omissions to be improper in this respect, and regards this part of the complaint to be well-founded.

Despite the lack of the above-mentioned guarantees, the Committee has observed that from the point in time where a policy concerning direct tapping of persons having legal privilege was established, which happened in 2007, in practice actions with regard to indirect tapping were evidently taken in compliance with this policy. Since the introduction of the policy in 2007, the number of transcribed phone calls of persons having legal privilege (in the event of indirect tapping) has declined very substantially. The Committee found that, also with regard to the transcription of indirectly tapped conversations, the service seems to be aware of the special status of persons having legal privilege.

(…)

The Committee found that before the 2007 policy regarding the direct tapping of persons having legal privilege was drawn up, in absolute terms via indirect tapping a large number of conversations/messages of persons having legal privilege were transcribed. It has doubts about the necessity of the transcription of these conversations/messages.

(…)

Despite the fact that, since the introduction of the 2007 policy concerning direct tapping, the AIVD has been more careful with the transcription of indirectly-tapped conversations of lawyers, according to the Committee a part of the conversations/messages has been unlawfully transcribed. This concerns communications that obviously cannot be regarded as relevant for any investigation by the AIVD. The Committee believes that the AIVD therefore acted contrary to the proper conduct standard of proportionality, by transcribing a part of the mentioned conversations. Therefore, it deems the complaint in this respect to be partially well-founded."

2.9. Following the judgement of 22 November 2012 of the European Court of Human Rights (ECtHR) in the so-called Telegraaf case (ECtHR 22 November 2012, no. 39315/06, Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands), the government put forward a legislative proposal on 19 September 2014 to amend article 19 Wiv 2002 (*Kamerstukken II,* 2014/15, 34 027, no. 2). In the Explanatory Memorandum the Minister writes that the ECtHR in the Telegraaf case considered that the use of special powers (tapping) by the AIVD against journalists of De Telegraaf constitutes a violation of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (right to respect for private and family life, home) and of article 10 ECHR (freedom of expression). The purpose of the legislative proposal is the introduction of a new article 19a Wiv 2002, which provides for a judicial review by the District Court of The Hague prior to the use of special powers against journalists if the use is intended to discover the sources of these journalists.

2.10. On 19 February 2015, the members of the Lower House of Parliament Van Nispen and Van Raak asked the Minister questions, following an argument of the *Nederlandse Orde van Advocaten* that a judicial review also has to take place prior to the tapping of lawyers. In a letter of 5 March 2015, the Minister informed the Lower Chamber of Parliament that, in his opinion, a prior judicial review is not necessary. In this letter the Minister refers amongst other things to statements of the CTIVD in the complaint procedure mentioned in 2.4 and further and the Telegraaf case.
In this letter, the Minister writes – insofar as relevant here – the following:
"I believe that the interactions between lawyers and clients are adequately secured. Within the framework of fulfilling their statutory duties, it is only under certain strict conditions that the services can exercise special powers against lawyers and furnish the obtained information to third parties.

(…)

The minister's approval is required for the use of the tapping power. The request for approval must explicitly point out the fact that this method is to be used against a person having legal privilege and emphasise the corresponding additional requirements. In addition, the approval for this use applies for a period of one month instead of the statutory period not exceeding three months. Moreover, it is only in highly exceptional cases that special powers can be exercised against a person having legal privilege who is a non-target. In this context, a non-target is a person in the environs of a target against whom a specific power is used in order to get a better view of the target. Furthermore, I want to point out that data obtained by using a special power can only be transcribed if this is strictly necessary for the services to properly carry out their duties. As a rule, data obtained by using the special powers against a person having legal privilege will also not be included in an official report to the Public Prosecutor.

The Review Committee for the Intelligence and Security Services (CTIVD) monitors the lawful implementation of Wiv 2002 and has already verified multiple times whether the special guarantees that apply to persons having legal privilege are being complied with by the services. Concerning the aforementioned complaint procedure, CTIVD finds that the AIVD has provided the use of special powers against persons having legal privilege, at least where lawyers are concerned, with sufficient guarantees and that in general, the service is restrained in the use of these powers. The identified shortcomings do not relate to the transcription of data obtained from the use of special powers against persons having legal privilege, but from the use against clients/third parties (indirect tapping). In my point of view I have adopted the advice of CTIVD. The policy has been fine-tuned and the wrongly transcribed conversations have been deleted and destroyed.
In view of the foregoing, I do not believe that the proposed introduction of a judicial review is necessary in this context. Furthermore, I note that the Wiv 2002 Evaluating Committee (the Dessens Committee) did not see any reason to make a recommendation with regard to persons having legal privilege.
(…)

I take the view that, with the legislative proposal, the judgement of the ECtHR has been fully implemented and that, given that it relates to the specific position of journalists within the context of article 10 ECHR, there is no reason to attach any consequences to the judgement for other professional groups, such as lawyers. This also in view of the above-described system of guarantees in which the services are bound to strict conditions in the exercise of the (special) powers that have been granted to them, and in which (structural) supervision is performed by CTIVD."

2.11. In its 2014-2015 annual report, published on 30 April 2015, the CTIVD has given the framework within which it assesses if there is a complaint about the tapping of persons having legal privilege. The annual report mentions the following:

- *"When tapping a person having legal privilege himself, such as a lawyer (direct tapping), there must be concrete indications that there is an immediate danger to national security.*
- *When tapping a person having legal privilege himself (direct tapping), the services must assess whether the interest of a good task fulfilment is more important than interest of the legal privilege (more profound proportionality review).*
- *When tapping a target of whereby it is foreseeable that he will have contact with a person having legal privilege (indirect tapping), the services must first explain what they will do with the communication between the target and the person having legal privilege.*
- *These considerations have to be written down in the justification before using the tap.*

- *If the services wish to prolong the tap, the will have to ask for approval from the minister involved every month instead of every three months*
- *A more profound proportionality review also applies for the transcription of telephone conversations with persons having legal privilege: for each phone call, the services shall, prior to the transcription, have to assess whether the interest of a proper task fulfilment outweighs the interest of the legal privilege;*
- *These methods must be established in the policy."*

In addition, the CTIVD writes that they are closely following the developments regarding the argument of lawyers relating to the introduction of an independent judicial review prior to the use of special powers and the introduction of a number recognition system.

2.12. In response to questions from Atty S. Diekstra, a lawyer established in The Hague, the Minister of Defence informed Atty Diekstra by letter on 26 March 2015 that nobody is exempted from application of the special powers granted to the *Militaire Inlichtingen- en Veiligheidsdienst* (MIVD = Defence Intelligence and Security Service), but that it is only under strict conditions that the service can use these powers against lawyers and furnish the obtained information to third parties. In this letter, the minister names conditions that are comparable to those the CTIVD sets forth in its annual report mentioned in 2.11. As an additional criterion for providing data to the public prosecutor, the minister informs that data obtained from the use of special powers against a person having legal privilege are normally not included in an official report to the public prosecutor, but that exceptions to this are possible. In that case, no more details will be included in the report than are strictly necessary, according to the minister.

3. The dispute

3.1. After modification of the claim, the plaintiffs demand – in essence – (i) to order the State to cease and not resume the direct and indirect tapping, receiving, recording, monitoring and transcribing of any form of communication of and with lawyers, or at least for the lawyers associated with Prakken d'Oliveira and for (other) defence lawyers in the Netherlands within seven days, or within a reasonable period, or at least to order the State to cease and not resume the above-mentioned actions with regard to **direct** tapping, and thereby to also order the State to take all necessary measures within this period to cease and not resume the above-mentioned actions regarding the **indirect** tapping of the lawyers and to notify the plaintiffs in writing about the measures taken and yet to be taken for this; (ii) to prohibit the State from furnishing information acquired through the aforementioned violation of the legal privilege to the public prosecutor or to use it in any other way. All of this applies in any case for as long as there is no procedure accompanied by adequate guarantees; on penalty of payment of a daily default fine and payment of the costs of the proceedings by the State.

3.2. In this context, the plaintiffs state the following. From the Minister's statements in the letter of 15 December 2014, the plaintiffs deduce that Prakken d'Oliveira's lawyers – who inter alia assist clients who are linked by the AIVD with terrorism and extremism – are being tapped on a large scale. This is a violation of the legal privilege and the related duty of confidentiality of the lawyers, as set down, inter alia, in articles 8 and 6 ECHR. This is especially true given that Prakken d'Oliveira also has clients who do not enjoy the special attention of the AIVD and who have the State as opposing party. There is a chance that lawyers are being tapped, not because they are a threat themselves to national security, but because they might know about facts that are interesting to the intelligence services. In order to guarantee the legal privilege, analogous to the judgement in the Telegraaf case and in accordance with the legislative proposal on the legal privilege for journalists it is necessary to provide for a judicial review before the use of special powers against persons having legal privilege. The currently-applied system, in which the minister involved give his approval based on a

secret policy and afterwards the CTIVD does a random-sample audit, cannot be regarded as a procedure with sufficient guarantees, meeting the requirements of article 8 paragraph 2 ECHR. Given that that this guarantee is lacking, it is impossible to assess whether the violation is necessary in a democratic society. Since the violation of the legal privilege is a continuous one, it cannot be demanded from the plaintiffs that they await the outcome of a proceeding on the merits or of the political decision-making process. Therefore, plaintiffs have an urgent interest in the requested measure. Given that the State still has not taken measures to protect the legal privilege of the plaintiffs, the sentence will have to be reinforced with a daily default fine.

3.3. The CCBE has submitted the same claims as the plaintiffs, with it being understood that they are demanding the obligations and the prohibition regarding all lawyers within the meaning of article 1 of the Council Directive to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC, OJ EC No. L 078 of 26/03/1977, pp. 17-18).

3.4. In short, the CCBE asserts that the current practice, where security services can tap lawyers directly or indirectly, conflicts with the fundamental basic rights established in existing laws and directives, including articles 6 and 8 of the ECHR, the provisions of the Charter of fundamental rights of the European Union (hereafter referred to as ‘the Charter’) and article 4 of the Directive no. 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ EU No. L 294). In these regulations and in the case law of the ECtHR, the confidentiality of the communication between lawyer and client is confirmed. Violations of this confidentiality namely affect the interests of the lawyers’ clients. If a violation of fundamental basic rights were to be allowed, these violations would have to be subject to strict, preventive and external guarantees, which do not exist today. Until the Dutch legislature has provided for statutes and regulations concerning the tapping of lawyers and the transcription of the recorded conversations, the tapping must stop and not be resumed.

3.5. The State puts forward a substantiated defence, which will be discussed below as necessary.

4. Assessment of the dispute

4.1 The plaintiffs and the CCBE assert that the State is acting unlawfully against them by making it possible that security services can tap and transcribe communication of and with lawyers having legal privilege. The civil judge, in this case the provisional relief judge, is competent to hear the claim based thereon. The plaintiffs and the CCBE are also admissible in their claim in so far as for them there is no other court proceeding offering sufficient guarantees in order to present their claim to the judge. This is also not a subject of dispute between the parties.

4.2. The State has presented a defence concerning another aspect of the CCBE's admissibility. It has asserted that in the absence of articles of association and insight into the actual activities of the CCBE, it cannot be verified whether it fulfils the requirements posed by article 3:305a of the Civil Code. In addition, the State has pointed out that there is no sign of a subpoena of the CCBE. Against this, the CCBE stated that it has full legal personality and that, pursuant to its articles of association, it represents the interests of European bars, including the *Nederlandse Orde van Advocaten*, and that it, on the basis of article III paragraph 1 sub c of its articles of association, has as its object the protection of the fundamental rights and freedoms, including access to justice and the protection of the client. The provisional relief judges deems all of this to be sufficient for the CCBE's admissibility. The provisional relief judge does not find that engaging in prior consultation with the State in the given circumstances, whereby the State has communicated its position and the CCBE intervenes in a proceeding, is required. Under the given circumstances, it would have been up to the State to make the importance of prior consultations plausible. It neglected to do so. Moreover, the provisional relief judge observes that the admissibility of CCBE is of secondary importance, since this makes little difference for the decision – granting or dismissal of the claim – and its consequences.

4.3. In this proceeding, it has to be assessed whether the State is obliged (i) to cease and not resume the (direct and indirect) tapping of communication of and with lawyers, as well as the transcription of the recorded conversations, (ii) to take measures in order to cease the indirect tapping of that communication; and (iii) whether the State should be prohibited from obtaining information from tapping the communication of and with lawyers (having legal privilege) and from furnishing it to the public prosecutor or using it in any other way. These issues will be addressed later. Tapping communication here means the application of special powers as understood in article 25 paragraph 1 Wiv 2002, including the transcription of the recorded contents thereof.

Direct and indirect tapping of lawyers

4.4. Rightly, it is not disputed between the parties that the legal privilege is a fundamental right and that tapping conversations between lawyers and their clients constitutes a violation of that legal privilege. On the basis of this fundamental right, each individual has the right to confidential communication with his lawyer. This has been established, inter alia, in article 4 of the Directive 2013/48/EU, which relates to criminal proceedings. A violation of the legal privilege affects (in any event) article 8 ECHR (right to respect for private and family life, home) and article 6 ECHR (right to a fair trial). These violations are all the more severe if information obtained by means of tapping a person having legal privilege is introduced into a (criminal) proceeding. Plaintiffs and the CCBE have also invoked the provisions of the Charter. However, these provisions are not applicable, because the Charter only applies to Member States that enforce the Union law, and that is *not* the case when using special powers. But none of this detracts from the interest of the legal privilege.

4.5. The legal privilege, which also has to be considered as a fundamental right outside the domain of the criminal law, is not absolute, however. For example, the recitals of Directive 2013/48/EU provide that the directive does not affect the activities that are conducted with a view to protecting national security, for example by the national intelligence services. The serious importance hereof is also not in dispute between the plaintiffs and the State. In its rulings, the ECtHR as well has allowed exceptions to the legal privilege. This is the case when for example the person having legal privilege (lawyer) is himself suspected of serious criminal offense. Insofar as the CCBE has argued that limitations of the legal privilege are not at all possible, this should be ignored.

4.6. The importance of the legal privilege, even where it concerns the special powers of the security services, is recognised by the State. In this respect, the State has drawn attention to the additional guarantees that apply for the (direct and indirect) tapping of communication of and with persons having legal privilege. This includes the procedure and the weighing of interests that precede the approval of the minister involved and the control exercised by the CTIVD. What must be assessed is the question of whether these additional guarantees provided by the State satisfy the requirements to be posed thereon light of article 8 ECHR paragraph 2.

4.7. Based on the case law relating to the article 8 paragraph 2 ECHR, violations of article 8 ECHR have to be provided for by the law (‘*in accordance with the law*’) and necessary in a democratic society in order to guarantee (for example) public safety. Provided for by the law does not only mean that the violation requires a legal basis (such as e.g. article 6 Wiv 2002), but also that the legislation must be accessible and the violation foreseeable. Moreover, the ECtHR, inter alia in the Telegraaf case, but also in Kennedy v. UK (ECtHR 18 May 2010, no. 26839/05) pointed out that guarantees are required in order to prevent abuse. According to the above-mentioned judgements, this guarantee does not necessarily need to consist of a (preventive) judicial review. According to these judgements, other than a judicial control, one could also consider putting into place a controlling body that has the authority to stop the tapping or to destroy the recordings thereof.

4.8. Contrary to what the plaintiffs have argued, the ECtHR in the Telegraaf case did not rule that the Wiv 2002 in its entirety did not fulfil the requirement of ‘provided for by the law’. The court ruled that the Dutch regulations regarding the use of special powers against journalists in order to identify their sources do not offer enough additional guarantees. The (then existing) guarantees were found to be insufficient in § 100 of the judgement, because the decision to use special powers was not preceded by an assessment performed by an independent body with the competence to prevent or terminate the use of these powers. Concerning the additional guarantees, moreover, the ECtHR did *not* require that they have to be established in a law. The ECtHR’s ruling cited by the plaintiffs in the case of Shimovolos v. Russia (ECtHR 21 June 2011, no. 30194/09) does not apply in this case, since we are dealing here with special powers (tapping) defined by law. In the case of Shimovolos v. Russia, by contrast, the issue was the inclusion of persons in a database, whose creation and use were based on an inaccessible ministerial regulation.

4.9. The State has argued that the position of lawyers is not comparable to that of journalists whose sources - as in the Telegraaf case - one is attempting to discover. In this connection the State pointed out that, unlike with lawyers having legal privilege, when it comes to journalists freedom of expression is at issue. According to the State, once a journalistic source is known, this can no longer be undone, while violation of the legal privilege of lawyers affects the right of their clients to a fair trial, whereby a possible violation in a criminal-law proceeding can be sanctioned, for example by excluding from consideration the unlawfully-obtained information. This argument is not followed; instead, the Provisional Relief Judge considers the following.

4.10. In essence, it is correct that the legal privilege of journalists has a different background than the (derived) legal privilege for journalists [*Sic.* Translator's note: I believe the court *meant* to end that sentence with "van advocaten" i.e. "for lawyers"]. This does not detract from the fact that the violation of the legal privilege of both journalists and lawyers has serious consequences for the principles of a democratic state under the rule of law. The mere possibility of violations of the legal privilege affects the confidentiality of the communication between lawyers and their clients and thus also affects the right to an effective defence and the accessibility of lawyers. Thus in a certain sense this violation is *also* irreversible. Considering the major consequences of (possible) violations of the legal privilege of lawyers and given that abuse in individual cases is potentially easy, the provisional relief judge believes that, in accordance with the ECtHR's considerations in § 98 of the Telegraaf case, it is highly desirable that there be an independent supervision over the exercise of the special powers where the supervisory body must have inter alia the authority to prevent or terminate the exercise of those special powers.

4.11. It is clearly established that under Wiv 2002 there is no independent body having the aforementioned authority. In the opinion of the provisional relief judge, the existing system does not offer sufficient equivalent guarantees. It is true that, according to the ministers' letters (as mentioned in 2.10 and 2.12) and the reports of the CTIVD, there does exist an internal (unpublished) policy on the basis of which an augmented proportionality review is performed prior to the use of special powers against lawyers, but in reality the ministers involved are hardly independent of the security services, while the CTIVD only does its review post facto, so that it does not have the possibility to prevent or terminate the exercise of specific powers against lawyers.

4.12. When asked about this at the hearing, in relation to the functioning of the security services the State raised no objections to independent preventive review. It merely declared that it was the choice of the legislature not to introduce such a review. It is striking hereby that in article 23 Wiv 2002 concerning the opening of mail and in the legislative proposal for article 19a Wiv 2002 regarding the application of special powers against journalists, in the case covered there such (preventive) independent review *was* provided for.

4.13 Considering the desirability expressed by the ECtHR of an independent body with the authority to prevent or terminate the application of special powers, and given that it has not appeared that the introduction of such a review with the guarantees mentioned by the ECtHR is problematic within a view to the relevant security interests, the provisional relief judge finds the existing policy unlawful regarding the protection of the confidentiality of the communication between lawyers and their clients. This judgement applies for all lawyers within the meaning of the Directive 77/249/EEC, in any event to the extent they are working in the Netherlands.

4.14. The provisional relief judge will give the State the opportunity, during a period of six months, to take measures in order to bring the application of special powers into compliance with the relevant requirements, including at a minimum the introduction of an independent review within the meaning of what is considered in 4.13. This independent review does not in all cases have to take place prior to the use of special powers. Especially in the case of indirect tapping, it will not always be clear beforehand that the information to be obtained might fall within the legal privilege. Nor is it required that this review be performed by a judge. In the above-cited decision of Kennedy v. UK and in the Telegraaf case, the ECtHR also deemed other forms of independent control to be conceivable. Therefore, it may remain open whether the required additional competencies can be assigned to the CTIVD, whose independence moreover is adequately guaranteed in article 65 Wiv 2002. The measures that the State must take also do not necessarily have to include the system of number recognition as proposed by the plaintiffs. In principle, this choice is left to the State.

4.15. In granting the above-mentioned time period, the provisional relief judge has taken into account that the scope of the use of special powers against lawyers and their clients is not sufficiently clear. In contrast to the plaintiffs and the CCBE, the provisional relief judge does not find any indication in the letter of 15 December 2014 from the Minister and in the CTIVD's reports that the lawyers of Prakken d'Oliveira or other lawyers were directly or indirectly tapped on a large scale. From the quotes cited from the Minister's letter, one can only deduce that before 2007, many conversations with persons having legal privilege obtained from indirect tapping were transcribed. In the Supervisory Report number 40 mentioned in 2.6, two cases were mentioned over the reporting period. Here too it concerned indirect tapping. The plaintiffs did not present any other facts or circumstances from which it could follow that they are now or in the recent past were being tapped on a large scale. From the cited reports and letters, it follows rather that the importance of the legal privilege is recognised by the security services and that a policy – albeit internal – was established in order to weigh the competing interests. Nevertheless, this does not detract from the fact that the State explicitly keeps open the possibility that communication of and with a person having legal privilege is being tapped. This is problematic, certainly where it involves the possibility of directly tapping lawyers who themselves are not a target of the security services. The State is therefore obliged – in order to further protect the legal privilege and thus the right to an effective defence and the access to justice – to take measures that make independent supervision possible over the exercise of special powers in situations where the legal privilege is at issue.

The use of recorded contents obtained from the tapping of communication between lawyers and their clients

4.16. In the criminal procedure system, it has been provided that information which is covered by the legal privilege cannot be taken into account. It would be incompatible with this system were security services able to bring information that is covered by the legal privilege to the attention of the public prosecutor.

4.17. Nevertheless, in the letters referred to in 2.10 and 2.12, the ministers involved explicitly leave open the possibility that the recorded contents from the use of special powers against a person having legal privilege, even if only in exceptional cases, can be included in an official report to the public prosecutor.

4.18. As considered with regard to the application of special powers against persons having legal privilege, the provisional relief judge finds that the passing on of information obtained by using special powers against persons having legal privilege is also unlawful if no independent review takes place concerning the lawfulness of the acquisition of this information. In the review to be conducted, one must assess whether the information is covered by the legal privilege or not, and if so, under which conditions this information may be provided. It is also up to the State to take the necessary measures on this point.

4.19. The provisional relief judge will therefore impose the prohibition set forth below. In imposing this unconditional measure, he has also taken into consideration that no specific cases were revealed in which the security services transferred information to the public prosecutor or used this information in any other manner.

Conclusion and costs of the proceeding

4.20. The conclusion is that the demands of the plaintiffs and the CCBE shall be granted in the manner described below.

4.21. The provisional relief judge does not see any reason to impose a daily default fine. Not only may it be expected from the State that it shall comply with judicial decisions, but one fails to see how a daily default fine would contribute to the effectiveness of the prohibition described below and the conditionally imposed order.

4.22. The State shall, being the party found to be most at fault, be ordered to pay the costs of these proceedings.

5. The decision

The provisional relief judge:

- orders the State - commencing six months after the service of this judgement - to cease and not resume the (direct and indirect) tapping, receiving, recording, monitoring and transcribing of any form of communication of and with lawyers;

- provides that this order shall lose its effect if the State, prior to the expiration of this period, has taken measures that provide for a policy on the basis of which the use of special powers with a view to protecting the legal privilege of lawyers within the meaning of directive 249/77/EEC can be reviewed by an independent body that in any case has the authority to prevent or terminate the exercise of special powers;

- prohibits the State from furnishing to the public prosecutor recorded contents obtained by using special powers whereby communication of and with lawyers having legal privilege are tapped without a prior independent review having taken place in the sense intended in 4.18 concerning the lawfulness of this provision;

- orders the State to pay the costs of these proceedings, until today estimated on the part of the plaintiffs at € 1,506.84, of which € 816 for lawyer's fees, € 613 for court registry fee and € 77.84 for summons costs, and on the part of the CCBE estimated at € 1,429, of which € 816 for lawyer's fees and € 613 for court registry fee;

- declares this judgement thus far to be provisionally enforceable;

- dismisses all additional and other claims.

This judgement was reached by Justice G.H.I.J. Hage and pronounced in public session on 1 July 2015.
wj

[*signature*]