

Please note that the text below is a translation from the CCBE of the case of *Prakken D'Oliveira and others v. The State of The Netherlands*. The original judgment in Dutch is available [here](#).

Decision

COURT OF APPEAL OF THE HAGUE

Civil Law Division

Case number : 200.174.280/01

Case/roll number of district court : C/09/487229/KG ZA 15-540

decision of 27 October 2015

in the case

the State of the Netherlands,
sitting in The Hague,
hereafter referred to as "the State",
appellant in the principal appeal,
respondent in the cross-appeal,
lawyer: Atty C.M. Bitter,

against

- 1. Marcus Franciscus van Wijngaarden,**
residing in Amsterdam,
- 2. Michiel Pestman,**
residing in Amsterdam,
- 3. Philip Jan Schüller,**
residing in Alkmaar,
- 4. Liesbeth Zegveld,**
residing in Amsterdam,
- 5. Britta Böhler,**
residing in Amsterdam,
- 6. Anna Maria van Eik,**
residing in Haarlem,
- 7. Göran Kimo Sluiter,**
residing in Heiloo,

- 8 **Cornelia Johanna Ullersma,**
residing in Amsterdam,
- 9 **Anna Willebrord Eikelboom,**
residing in Amsterdam,
- 10 **Channa Samkalden,**
residing in Watergang,
- 11 **Tamara Mary Domitila Buruma,**
residing in Amsterdam,
- 12 **Edward van Kempen,**
residing in Amsterdam,
- 13 **Annebrecht Vossenbergh,**
residing in Amsterdam,
- 14 **Tomasz Jerzy Kodrzycki,**
residing in Amsterdam,
- 15 **Hana Maria Agnes Elisabeth van Ooijen,**
residing in Bussum,
- 16 **Tom de Boer,**
residing in Amsterdam,
- 17 **Nederlandse Vereniging van Strafrechtadvocaten**
[the Dutch Association of Criminal Defence Lawyers],
established in Goirle,
hereafter referred to as "the NVSA",

respondents in the principal appeal,
hereafter also jointly referred to as "Van Wijngaarden et al.",
lawyer: Atty Ch. Samkalden in Amsterdam,

and against

the legal entity under Belgian law **Raad van Europese Balies [the Council of Bars and Law Societies of Europe],**
established in Brussels, Belgium,
hereafter referred to as "the CCBE",
respondent in the principal appeal,
appellant in the cross-appeal,
lawyer: Atty O.R. van Hardenbroek van Ammerstol in The Hague.

The legal proceeding

By writs of 27 July 2015, the State filed appeal against the judgement of the Provisional Relief Judge in the District Court of The Hague of 1 July 2015, issued between Van Wijngaarden et al. as

plaintiffs, the State as defendant and the CCBE as intervening party. In these writs the State adduced four grounds for appeal against the contested judgement. Van Wijngaarden et al. have challenged those appeal grounds in a Statement of Defence on Appeal. The CCBE has also challenged these grounds of appeal in a Statement of Defence on Appeal and filed a cross-appeal, adducing two grounds. The State has disputed the appeal grounds in the cross-appeal in its Statement of Defence on Appeal in the cross-appeal. On 23 September 2015 the parties argued the case before the court, the State via its attorney, Van Wijngaarden et al. via their lawyer as well as via Attys T.J. Kodrzycki and M. Pestman, lawyers established in Amsterdam, and the CCBE via its lawyer. The memoranda of oral pleadings which the lawyers based themselves on have been submitted to the court. Van Wijngaarden et al. and the CCBE took this occasion to introduce further (partly the same) productions into the proceeding. Finally, a decision is requested.

Assessment of the appeal

1.1

Given that no appeal grounds are aimed against the facts that the Provisional Relief Judge presented in sections 2.1 through 2.12 of his judgement, the court also proceeds on the basis of these facts. The issue in this case is as follows.

1.2

Respondents 1 through 16 work as lawyers in the Prakken d'Oliveira law firm in Amsterdam. The NVSA is an association that, as appears from its articles of association, defends the interest of the defence in criminal matters. Virtually all specialised criminal defence lawyers in the Netherlands are members of the NVSA.

1.3

On the basis of article 25 of the *Wet op de inlichtingen- en veiligheidsdiensten 2002* (Wiv 2002 = Intelligence and Security Services Act), the *Algemene Inlichtingen- en Veiligheidsdienst* [General Intelligence and Security Service] or the *Militaire Inlichtingen- en Veiligheidsdienst* [Defence Intelligence and Security Service] (hereafter referred to as "the services") are authorised (inter alia) to tap telephone calls. Paragraph 1 of article 25 reads as follows:

The services are authorised, using technical equipment, to tap, receive, record and monitor any type of call, telecommunication or data transfer by means of an automated process, regardless of where any of this takes place. The authorisation intended in the first sentence also includes the power to decrypt the calls, telecommunication or data transfer.

1.4

The tapping by the services of telephone calls in which a lawyer is participating can arise in the following situations: (a) if the telephone of a lawyer is being tapped because the latter is himself the object of investigation, (b) if the telephone of a lawyer is being tapped although he is not himself the object of investigation by the services, and (c) if someone other than the lawyer is the object of investigation, the telephone calls of this other person are being monitored and thus also any calls he might make with a lawyer are intercepted. The situations (a) and (b) are designated by the term 'direct tapping', while situation (c) is called 'indirect tapping'.

1.5

Article 38 paragraph 1 Wiv 2002 reads as follows:

If, during the processing of data by or for the benefit of a service, data is discovered that may also be important for the detection or prosecution of criminal offences, this data can be communicated in writing to the member of the Public Prosecutor's Office designated for this purpose by Our involved Minister or, on his behalf, by the head of the service, without prejudice to the case that a statutory obligation exists to do so.

1.6

The *Commissie van toezicht betreffende de inlichtingen- en veiligheidsdiensten* (CTIVD = Review Committee for the Intelligence and Security Services) is, on the basis of article 64 Wiv 2002 responsible (inter alia) for supervising the lawfulness of the execution of what is established by or pursuant to this law, the requested and unrequested informing and advising of the involved ministers (of the Interior and Defence) and the advising of the involved ministers in the matter of the examination and assessment of complaints.

1.7

On 8 April 2014, respondents 1 through 16 filed a complaint with the Minister of the Interior and Kingdom Relations (hereafter referred to as "the Minister") concerning the actions of the General Intelligence and Security Service (AIVD), which, by tapping telephone calls, supposedly breaches their legal professional privilege as lawyers. In this letter they also requested that a number recognition system be introduced.

1.8

On 16 September 2014 the CTIVD, in response to this complaint, submitted an opinion to the Minister. The Minister in his letter of 15 December 2014 followed the advice of the CTIVD and declared the complaint to be partially unfounded and partially well-founded. The complaints were declared to be unfounded in so far as they were aimed at direct tapping. The complaints were declared to be well-founded because, in so far as they concerned indirect tapping, within the AIVD there was no written policy on transcribing telephone calls and e-mails between lawyers and clients/third parties and because more such calls were transcribed by the AIVD than was necessary. The Minister rejected the request for the introduction of a number recognition system.

1.9

Van Wijngaarden et al. assert that the Minister's response to the complaint reveals that confidential communication of (inter alia) the lawyers at Prakken d'Oliveira is being intercepted. According to them, the State is violating the legal professional privilege of these lawyers. Van Wijngaarden et al. demand that the State be ordered, in short, to cease the tapping and transcribing of any form of communication by and with lawyers, and that the State be prohibited from turning over the information that is obtained by violating the legal professional privilege to the Public Prosecutor's Office.

1.10

The CCBE (abbreviation for 'The Council of Bars and Law Societies of Europe') is an association under Belgian law that promotes the interests of its members, the European Bars and Law Societies. As an intervening party, the CCBE filed claims similar to those of Van Wijngaarden et al. against the State, with it being understood that it made what is being demanded more specific by asserting that the prohibition must apply with regard to *all* lawyers within the meaning of article 1 of the Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (Directive 77/249/EEC).

1.11

The Provisional Relief Judge granted the claims to a large degree. He ordered the State, effective six months after service of the judgement, to cease and discontinue the (direct and indirect) tapping, receiving, recording, monitoring and transcribing of any form of communication by and with lawyers, unless the State has before then taken measures on the basis of which the use of special powers can be reviewed by an independent body which, in any event, shall have the power to prevent or terminate such actions. He furthermore prohibited the State, effective immediately, from providing results obtained from the use of special powers whereby communication by and with lawyers enjoying the legal professional privilege is monitored to the Public Prosecutor's Office,

without an independent review having taken place prior to this provision with regard to the lawfulness thereof, during which review one must judge whether the information falls under the legal professional privilege and if yes, under what conditions it may be provided.

1.12

The grounds on which the Provisional Relief Judge based his decision can, in so far as important on appeal, be summarised as follows. The monitoring of calls between lawyers and their clients violates the legal professional privilege of the lawyer. This breach affects article 8 ECHR (right to respect for private, family and home life) and article 6 ECHR (right to a fair trial). However, in light of inter alia the case-law of the European Court of Human Rights [ECtHR], this legal professional privilege is *not* absolute. Thus it is not correct, as the CCBE argues, that limitations on the legal professional privilege are altogether impossible. In light of the serious consequences of (possible) violations of the legal professional privilege of lawyers, and because abuse in individual cases is potentially easy, it is highly desirable that there be independent supervision over the exercise of the special powers, whereby the supervisory body inter alia must have the authority to oppose or terminate the exercise of these special powers vis-à-vis lawyers. Under Wiv 2002, there is no independent body possessing such authority, while the State has raised no objections to independent preventive review. The existing policy is thus unlawful vis-à-vis all lawyers within the meaning of Directive 77/249/EEC, in any event in so far as they are active in the Netherlands. During a period of six months the State receives a chance to introduce the required independent review. This review does not always in all cases have to take place *prior* to the use of special powers. In the case of indirect tapping it will not be clear in advance in all cases that the information to be obtained might fall under the legal professional privilege. Nor is it required that the review be performed by a judge. Passing on the information obtained from the use of special powers vis-à-vis those enjoying the legal professional privilege is also unlawful if no independent review has taken place. In this review one must assess whether the information falls under the legal professional privilege and, if so, under what conditions it may be provided.

1.13

By letter of 27 July 2015, the Minister gave to the Lower House a reaction to the judgement of the Provisional Relief Judge. In this letter the Minister, also on behalf of the Minister of Defence, let it be known that the Cabinet wants to provide a form of independent review for the case of tapping lawyers, that an amendment of the law is necessary for this, and that the way the independent review will be structured is the subject of consultation within the Cabinet.

in the principal appeal

2.1

Broadly speaking, the objections of the State against the judgement of the Provisional Relief Judge are as follows:

- (i) the Provisional Relief Judge wrongly posed the requirement that an independent review must be provided for both direct and indirect tapping;
- (ii) the period of six months is too brief for adopting legislation regulating such an independent review;
- (iii) the Provisional Relief Judge wrongly gave an opinion about what an independent examination must entail;
- (iv) the Provisional Relief Judge wrongly gave immediate effect to the prohibition on furnishing information to the Public Prosecutor's Office without independent review.

2.2

The State further elaborates objection (i) in appeal ground 1. The State believes that the Provisional Relief Judge wrongly posed the requirement that an independent review must be provided when (directly or indirectly) tapping lawyers. The Provisional Relief Judge erroneously derives this from the decision of the ECtHR of 22 November 2012, no. 39315/06 (Telegraaf). There are relevant differences between that case, which involves the protection of a journalist's source,

and the lawyer's legal professional privilege. From the case-law of the ECtHR it also appears that *post facto* review, provided that it is effective, can offer adequate guarantees. Moreover, the Provisional Relief Judge fails to recognise that the State in this respect enjoys discretionary power and that in this summary proceeding there can only be room for a preliminary injunction when there is an unmistakably wrongful act. There is nothing like that, at most one can deduce from the case-law of the ECtHR that an independent review is 'desirable', according to the State.

2.3

The court finds that there is no dispute that the communication between a lawyer and his client falls under the protection of article 8 ECHR. The ECtHR has confirmed this several times, inter alia in its decision of 6 December 2012, no. 12323/11 in the case of *Michaud v. France*. In that decision, the ECtHR considered that the correspondence between lawyer and client has a "privileged status where confidentiality is concerned" and that it attaches particular importance to the risk that the "proper administration of justice" could be affected. The ECtHR further considered:

"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 (...)" (underlining by the court of appeal)

The decision in the *Michaud* case did not relate to the *tapping* of a lawyer's calls. However, the case of *Kopp v. Switzerland* of 25 March 1998, no. 13/1997/797/1000, very much did. Therein the ECtHR considered:

"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 minimise 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 order must be approved by the President of the Indictment Division (...), who is an independent judge, or the fact that the applicant was officially informed that his telephone calls had been intercepted (...).

73. However, the Court discerns 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, which is moreover generally accepted, that legal professional privilege covers only the relationship between a lawyer and his clients, the law does not 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 that this task should 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 defence." (underlining by the court of appeal)

2.4

Of the cases that related to the monitoring of telephone calls where no lawyer was involved, inter alia the cases *Kennedy v. United Kingdom* of 18 May 2010, no. 26839/05 and *Weber and Saravia v. Germany* of 29 June 2006, no. 54934/00 are important. In the *Kennedy* case the ECtHR considered:

"167. The Court recalls that it has previously indicated that 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 extensive jurisdiction of the 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 that there has been an interception of his communications. The Court emphasises that the IPT is an independent and impartial body, which has adopted 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 provide it with any assistance it thinks fit and the power to order disclosure by those involved in the authorisation and execution of a warrant of all documents it considers relevant (....). In the event that the IPT finds in the applicant's favour, 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 specific guarantees that were made in the United Kingdom, the ECtHR was of the opinion that article 8 ECHR had not been violated. In the *Weber and Saravia* case as well the ECtHR came to the conclusion that the conditions of article 8 ECHR were satisfied because the monitoring was subject to independent supervision:

"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 recognised 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 undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse (....). This assessment depends on all the circumstances of the case, such as 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 kind of remedy provided by the national law (....)." (underlining by the court of appeal)

and

"117. As regards supervision and review of 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, including members of the opposition. 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, which had to authorise surveillance measures and had substantial power in relation to all stages of interception. The Court observes that in its judgment in the *Klass and Others* case (....) it found this system of supervision, which remained essentially the same under the amended G 10 Act at issue here, to be such as to keep the interference resulting 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." (underlining by the court of appeal)

In the *Klass and Others v. Germany* case, which did not relate specifically to the monitoring of lawyers, the ECtHR considered:

"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 accordance with the Act and is relevant to the purpose of the measure; he destroys any other intelligence that may have been gathered (see paragraph 20 above). (underlining by the court of appeal)

(...)

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 such harmful 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 G 10, the Court concludes that the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society." (underlining by the court of appeal)

2.5

In the case of *the Telegraaf v. Netherlands* (ECtHR 22 November 2012, no. 39315/06), which involved the tapping of journalists in order to discover the identity of their sources, the ECtHR considered:

"97. The present case is characterised precisely by the targeted surveillance of journalists in order to determine from whence they have obtained their information. It is therefore 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 such harmful 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 of 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 moreover had the power to order the immediate termination of the measures in question (...). In *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, likewise 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 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 *post factum* could not cure these failings, since it could not prevent 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 appear to have been authorised by the Minister of the Interior and Kingdom Relations, if not by the head of the AIVD or even a subordinate AIVD official, but in any case without prior review by an independent body with the power to prevent or terminate it (section 19 of the 2002 Intelligence and Security Services Act, see paragraph 51 above).

101. Moreover, 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, cannot restore the confidentiality of journalistic sources once it is destroyed.

102. The Court thus finds that the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their journalistic sources. There has therefore been a violation of Articles 8 and 10 of the Convention.” (underlining by the court of appeal)

2.6

These decisions permit no other conclusion than that, in the opinion of the ECtHR, already the monitoring of those *not* enjoying the legal professional privilege must be provided with a form of independent supervision. Already this finding can support the judgement of the Provisional Relief Judge, given that it is established that such independent supervision is absent.

2.7

The court is of the opinion that the requirements that the (direct or indirect) tapping of a lawyer must satisfy are not lower than the requirements imposed on the tapping of those who do *not* enjoy the legal professional privilege, since the ECtHR points out that the communication between lawyer and client has a ‘privileged status’ and that when monitoring a lawyer not only the respect of the lawyer’s private life but also the proper administration of justice can come under threat. The court also notes here that the legal professional privilege is granted to the lawyer on the basis of the general interest that is involved so that one can call upon the assistance of a lawyer (HR 22 June 1984, NJ 1985, 188) and so that no one shall refrain, due to a fear that certain facts will become known, from calling on the assistance of a lawyer (HR 11 November 1977, NJ 1978, 399). Against this background it is of great importance that those who turn to a lawyer or are considering doing so, can rely on the confidentiality of their communication with said lawyer being in principle guaranteed, and that this can be breached only in special cases and under the supervision of an independent body. The court is thus of the opinion that although the journalist’s right to source protection is not in every respect comparable with the lawyer’s legal professional privilege, there is no occasion to afford *fewer* guarantees to the tapping of a lawyer.

2.8

The foregoing means that the Provisional Relief Judge correctly arrived at the judgement that direct and indirect tapping of lawyers is only admissible if independent supervision as intended above is provided. He also correctly considered that such independent supervision is presently lacking. Moreover, that is not in dispute between the parties. The CTIVD admittedly has a supervisory task and can on that basis commence an independent investigation into the way that the Wiv 2002 is implemented (article 78), but this can only result in the issuance of a supervision report to the Minister (article 79). In addition, the CTIVD can advise the Minister (whether requested to do so or not) and it has an advisory role in the handling of complaints (article 64 paragraph 2). The CITVD does not have any direct involvement in the tapping of lawyers, it also does not have (for example) the power to *stop* the tapping of a lawyer. The circumstance that, within the services and as a matter of policy, certain guarantees are taken into account when tapping lawyers and transcribing intercepted material, is irrelevant here. After all, this is not a form of *independent* supervision.

2.9

It is not the court’s responsibility to pronounce on the question of what the required independent supervision must look like and what requirements it will have to meet. That is also unnecessary for granting the claim; for that, it is enough that independent supervision as understood by the ECtHR is currently lacking. Moreover, a judgement on the independent supervision can only be given when it is known what it looks like. After all, as follows from the ECtHR decisions cited about, the question of whether there is adequate independent supervision involves the evaluation of a system of interrelated measures and powers. The State shall have to structure the independent supervision on the basis of the criteria that are developed in the ECtHR case-law. Moreover, it will have to give particular weight to the special position of the lawyer (touched on above under 2.7). This does not

detract from the fact that the Provisional Relief Judge correctly deduced from the ECtHR case-law that independent supervision in the sense intended by the ECtHR is inconceivable if the supervisory body does not at the very least have the power to prevent or terminate the (direct or indirect) tapping of lawyers. This follows unmistakably from the decision in the *Telegraaf* case and the court sees no occasion to apply a different criterion for the tapping of a lawyer. Contrary to what the State argues, the Provisional Relief Judge also did not fail to recognise that *post facto* review, provided that it is effective, can also offer adequate guarantees. On the contrary, the Provisional Relief Judge in so many words considered that the independent review does not in all cases have to be carried out prior to the use of special powers (decision ground 4.14), provided that the supervisory body has the power to prevent *or* terminate the tapping of lawyers (decision grounds 4.13 and 4.14).

2.10

The State also argued that the Provisional Relief Judge should have left it with a marginal review, because provisional relief in this summary proceeding could only be granted if there is an unmistakably unlawful act. This argument fails. The prohibition pronounced by the Provisional Relief Judge on tapping lawyers and on passing on the information obtained from these taps to the Public Prosecutor's Office does not entail that the Wiv 2002 or parts thereof are invalidated or declared non-binding. Only for a specific case - the direct or indirect tapping of lawyers - does the prohibition pose limits on the exercise of the power that the services receive on the basis of articles 25 and 38 Wiv 2002, limits that the services should also take into account themselves as a matter of policy. The criterion that there must be unmistakable unlawfulness is thus not applicable. Further, it is admittedly true that the states have a relative broad margin of appreciation in establishing the measures that are necessary with a view to protecting national security (see *Weber and Saravia* above), but from the case-law of the ECtHR it unambiguously follows that this margin is not so broad that one can omit independent supervision of the tapping of lawyers. Moreover, there can be no doubt that the required independent supervision is absent in this case.

2.11

Finally, the ground for appeal opposes the judgement of the Provisional Relief Judge that his judgement applies for *all* lawyers within the meaning of Directive 77/249/EEC. According to the State, that is both unclear and unenforceable. The prohibition would have to be limited to lawyers who are registered in the Netherlands. This complaint does not hold up, because it would mean that the tapping of lawyers active in the Netherlands who are registered in a different EU Member State is surrounded by fewer guarantees than the tapping of lawyers registered in the Netherlands, without there being any clear justification for this distinction. This is in conflict with the right to free establishment of article 49 TFEU and the scope of Directive 77/249/EEC. Moreover, the lawyer of the CCBE during oral arguments indisputably asserted that all lawyers who wish to be active in the European Union are registered with the CCBE and that it can be verified who these lawyers are via a website that is accessible to everyone. The court thus deems it implausible that the prohibition imposed by the Provisional Relief Judge is unenforceable.

2.12

Appeal ground 1 is unsuccessful.

3.1

With appeal ground 2 the State contends firstly that the Provisional Relief Judge substantively gave an order to adopt legislation, something which, in the view of the State, he is not competent to do. Moreover, an order to change a system is not a form of provisional relief that can be given in a summary proceeding.

3.2

This complaint fails. The Provisional Relief Judge did not impose an order to adopt legislation, nor a prohibition that substantively comes down to the same thing. Nor did he order the State to implement a system modification. The Provisional Relief Judge has prohibited the tapping of lawyers and the furnishing of tapped information to the Public Prosecutor's Office, because the requirement of adequate independent supervision is not fulfilled. It goes without saying that this prohibition no longer applies if the State *does* introduce adequate independent supervision, but this still does not mean that the Provisional Relief Judge directly or indirectly gave an order to adopt legislation. Moreover, in the court's judgement it is admittedly very desirable that legislation be adopted in this area, but that is not strictly necessary (see below under 3.3).

3.3

The State further complains in this ground for appeal that the period of six months is too short for adopting legislation. The State has no success with that argument, either. In the first place, the court is not convinced that the required independent supervision can only be introduced by means of legislation. The State also absolutely does not establish why, at least as a transitional measure while awaiting definitive legislation, a (published) policy concerning the way in which the services will make use of their powers on the basis of articles 25 and 38 Wiv 2002 wouldn't suffice. Secondly, the ruling of the Provisional Relief Judge cannot have come as a surprise for the State. The State could and should have already deduced much earlier from the case-law of the ECtHR that under the Wiv 2002 there are insufficient guarantees for tapping lawyers (in any case). For this reason as well, the court does not see sufficient reason to grant the State a term longer than six months after the service of the judgement of the Provisional Relief Judge.

3.4

Under 4.19 and 4.20, the State formulates a number of questions about the fulfilment of the review to be performed by the independent body. Van Wijngaarden et al. correctly point out that the State has to answer these questions itself, on the basis of the criteria developed in the ECtHR case-law, when structuring the necessary independent supervision. The State also cannot reasonably complain, on the one hand, that the Provisional Relief Judge involves himself too much with the content of the regulation to be drafted and, on the other, that he did not give greater clarity about the content of that regulation. The Provisional Relief Judge properly restricted himself to indicating minimum requirements deriving from the ECtHR case-law that such a regulation will have to satisfy.

3.5

In the conclusion of this appeal ground, the State complains that the review demanded by the Provisional Relief Judge in the case of indirect tapping is only enforceable with introduction of a number recognition system, while a number recognition system would mean that absolutely no weighing can be made between the interest of national security and the legal professional privilege - something which, according to the State, is unacceptable from the perspective of protecting national security. This argument too fails to convince. The Provisional Relief Judge rightly noted that the independent review does *not* have to take place in all cases prior to the tapping, because - certainly for indirect tapping - this will not always be possible. Contrary to what the State argues, a number recognition system is not the only possible solution, and so one fails to understand why there would be no room for the weighing intended by the State between the protection of national security and the interest of the lawyer's legal professional privilege. In their Statement of Defence on Appeal, on page 22 under note 46, Van Wijngaarden et al. made a suggestion for a system of review in case of indirect tapping, where the system does *not* automatically shut off if a call with a lawyer is conducted, but the information is saved and it is first made known to the services after an independent review. The State has not argued that such a system would be unworkable.

3.6

Appeal ground 2 is unsuccessful.

4.1

With appeal ground 3 the State raises against the judgement of the Provisional Relief Judge the fact that the State may not provide to the Public Prosecutor's Office any information obtained from the tapping of lawyers so long as no independent review has taken place with regard to the lawfulness of such provision. According to the Provisional Relief Judge, this review entails that one must assess whether the information falls under the legal professional privilege and, if yes, under what conditions this information may be provided (judgement under 4.18). The State believes that, under exceptional circumstances, such as to prevent an imminent attack, information does have to be able to be provided to the Public Prosecutor's Office, possibly also already before the independent supervision is introduced.

4.2

The court has above considered that the direct and indirect tapping of lawyers at present is in conflict with article 8 ECHR and thus unlawful. That the Provisional Relief Judge gave the State a period of six months to still introduce such independent supervision does not alter the fact that the direct or indirect tapping of lawyers right now is already unlawful. The court is of the opinion that the Provisional Relief Judge correctly decided that the information obtained with such unlawful taps may not be provided to the Public Prosecutor's Office and that he correctly put this prohibition into immediate effect, since article 38 Wiv 2002, which gives the services the power to furnish processed data to the Public Prosecutor's Office, specifies as the reason for this provision that it involves data that can be important for the detection or prosecution of criminal offences. This means that it can by no means be excluded that information which is obtained through the services' tapping of confidential calls between a lawyer and his client, is used in the criminal proceeding. Without adequate guarantees, which are lacking, that is unacceptable, given that this would be in conflict with one of the fundamental principles of a *fair trial*, more specifically with article 6 paragraph 3 under c ECHR. After all, the ECtHR has noted as one of these fundamental principles the right of the suspect to consult with his lawyer without supervision and out of hearing of any third person. See *Dominichini v. Italy* (15943/90) under 39; *Öcalan v. Turkey* (46221/99) under 1333; *Moiseyev v. Russia* (62936/00) under 209. In *S. v. Switzerland* (12629/87) the ECtHR considered:

"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

Already the possibility that, except for in very special cases that can be clearly formulated, such information is passed on to the Public Prosecutor's Office can have as a consequence that persons refrain from calling on a lawyer. Even that is in conflict with the import of article 6 paragraph 3 under c ECHR and with the rationale of the legal professional privilege granted to a lawyer. The passing on of information obtained from taps to the Public Prosecutor's Office can thus only be justified under rather extraordinary circumstances, such as the case mentioned by the State that an attack can be thwarted. However, at present the power of the services to pass on information to the Public Prosecutor's Office is *not* limited to such exceptional cases. Also missing on this point is

a published policy to which the services are bound and from which litigants could deduce that this power will only be used in the mentioned exceptional cases.

4.4

The Provisional Relief Judge also correctly decided that the passing on of information obtained from lawyer taps to the Public Prosecutor's Office requires a review by an independent body, whereby moreover the Provisional Relief Judge did *not* decide that this review always has to take place in advance. Such a specific review is presently lacking. The general remit of the CTIVD to supervise the lawfulness of the execution of what is established by or pursuant to the Wiv 2002 is too general for this, and does not guarantee that the passing on of information to the Public Prosecutor's Office shall be tested by it each time on the basis of all circumstances of the present case.

4.5

That the criminal judge can leave out of consideration unlawfully obtained evidence that is produced by the Public Prosecutor's Office does not mean that the civil judge cannot forbid the services from giving such information to the Public Prosecutor's Office. Moreover, the unlawfully obtained information does not always have to be evidence, but it is also possible that the Public Prosecutor's Office is informed via the services about the procedural tactics of the suspect and his attorney and can draw advantage from this without the judge ever learning of it. Moreover, a review by the judge afterwards cannot eliminate the fact that there is a risk that suspects will turn to a lawyer less readily if they know that their calls with a lawyer can end up in the hands of the Public Prosecutor, without an independent review having taken place which concludes that it is an exceptional case.

4.6

The Provisional Relief Judge thus correctly decided that information obtained from taps of lawyers may only be furnished to the Public Prosecutor's Office if, in so far as this information falls under the legal professional privilege, there has been an independent test of whether this is permissible. It is up to the State to develop criteria on the basis of which it can be determined what information may be furnished, in which cases and under what conditions, to the Public Prosecutor's Office. It is also up to the State to organise the supervision of such provisions and to determine when permission is necessary in advance and under what exceptional circumstances (such as in emergencies where national security is at stake) *post facto* review can be sufficient.

4.7

Given that all these guarantees are absent, the court is of the opinion that passing on information obtained from lawyer taps to the Public Prosecutor's Office is unlawful. The Provisional Relief Judge thus correctly put the prohibition on passing on this information into immediate effect, given that this involves information obtained unlawfully because in violation of article 8 ECHR which, if it were provided to the Public Prosecutor's Office, would lead to a serious breach of article 6 paragraph 3 under c ECHR.

4.8

On the basis of the foregoing, appeal ground 3 fails.

4.9

Appeal ground 4 has no independent significance and requires no separate discussion.

in the cross-appeal

5.1

Ground 1 is aimed at two decision grounds of the Provisional Relief Judge, in which the Provisional Relief Judge considers that the EU Charter is not applicable and that the legal professional privilege is not absolute. According to the CCBE, the Charter *does* apply and the legal professional privilege *is* absolute, although not all communication of a lawyer with his client falls under the legal professional privilege. Along these same lines, the CCBE contends in ground 2 that the words "concerning the lawfulness of this provision" must be deleted. The grounds can be usefully treated together.

5.2

Whether the Charter applies in this case can remain an open question, given that it is not asserted nor did it appear that the testing of the behaviour of the State against the Charter would lead to a different outcome.

5.3

Otherwise, the grounds rest on the conception that the lawyer's legal professional privilege is absolute, but that the legal professional privilege does not extend to cases in which e.g. the lawyer himself participates in criminal actions or is informed by his client about an imminent attack. Thus, from the perspective of the CCBE, it would not have to be assessed whether a breach of the legal professional privilege is allowed, since that would never be the case, but instead of that one would have to verify how far the legal professional privilege extends. The court is not convinced that there is anything more than a war of words here. Nor does the conclusion impose itself that in practice the approach advocated by the CCBE would lead to a different outcome. The CCBE thus also has no interest in this argument. Moreover, the court finds that in its case-law the ECtHR always proceeds on the assumption that the legal professional privilege is *not* absolute. The court sees no reason to depart from this.

5.4

The cross-appeal does not succeed.

conclusion

6.1

Given that the grounds contained in both the principal appeal and the cross-appeal all fail, the court will confirm the judgement of the Provisional Relief Judge.

6.2

In the principal appeal, the State as the losing party will be ordered to pay the costs of the legal proceeding on appeal. Included in this are the (yet to be incurred) subsequent costs (for which the following condemnation gives an executory title - HR 19 March 2010, LJN: BL1116). Under article 237, third paragraph of the Code of Civil Procedure, the determination of the costs of the proceeding by the Court in this decision remain limited to the costs incurred prior to the ruling. There is no reason for allocating the statutory commercial interest. The CCBE will be ordered to pay the costs of the cross-appeal.

Decision

The court:

in the principal appeal:

- confirms the judgement being appealed;
- orders the State to pay the costs of the legal proceeding on appeal, up to today on the part of Van Wijngaarden et al. estimated at € 711 for out-of-pocket expenses and € 2,682 for lawyer fees, and on the part of the CCBE estimated at € 711 for out-of-pocket expenses and € 2,682 for lawyer fees, and provides that on this condemnation pronounced in favour of the CCBE the statutory interest will be owed after the fifteenth day from this decision;
- declares this decision to be provisionally enforceable with regard to the trial cost condemnation;

in the cross-appeal:

- confirms the judgement being appealed;
 - orders the CCBE to pay the costs of the legal proceeding on appeal, up to today on the part of the State estimated at zero for out-of-pocket expenses and € 1,341 for lawyer fees.
- This decision is issued by Judges S.A. Boele, A. Dupain and J.J. van der Helm and pronounced in public session of 27 October 2015, in the presence of the Clerk of Court.

[Signatures]

For certified true copy,
The Clerk of the Court of Appeal
in The Hague