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CCBE Info

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Protecting the freedom of expression of lawyers
Fighting warrantless wiretapping of lawyer-client communications
Requesting strong, independent safeguards for domestic intelligence gathering

The CCBE sometimes intervenes in court cases or other procedures, at European and national levels, when the case affects the core values of the profession and the safeguarding of fundamental freedoms. This issue of CCBE-INFO looks at three key cases in 2015 where the CCBE was a party - in defense of freedom of expression and the right of citizens to consult privately with a lawyer.

PROTECTING THE FREEDOM OF EXPRESSION OF LAWYERS

Lawyers play a key role in defending freedom of expression, both inside and outside the courtroom, redrawing new boundaries through the cases they bring and acting as the voice of the voiceless before the judicial institutions.

Lawyer Olivier Morice was sentenced by a French court in 2008 for questioning the impartiality of the judges in charge of the inquiry into the assassination of Judge Bernard Borrel in 1995 in Djibouti, and brought the case to the European Court of Human Rights (ECHR). The CCBE intervened in the case as a third party in order to secure stronger safeguards for freedom of expression across Europe.

The Court in its Grand Chamber judgement on 23 April held that France has violated Article 6 § 1 (right to a fair trial) and Article 10 (freedom of expression) of the European Convention on Human

Rights. The Grand Chamber noted that Me Morice had expressed a value judgement with a sufficient factual basis, and that his comments were part of a debate on a matter of public interest as they referred to the functioning of the justice system.

"We welcome this positive outcome", says CCBE President Maria Ślęzak, *"The freedom of expression of lawyers ensures they can contribute to the proper administration of justice and bolster the confidence of the public in the justice system."*

Read more: [[Case of Morice v. France](#)]

FIGHTING WARRANTLESS WIRETAPPING OF LAWYER-CLIENT COMMUNICATIONS

The law firm Prakken d'Oliveira is subject of particular interest for both the civil and military intelligence services in the Netherlands, says Michiel Pestman, lawyer at the firm. At a certain moment, his colleagues suspected that their telephone lines were tapped.

After a complaint was filed with the Commission that governs the security services, the Dutch Minister of the Interior admitted that the Dutch intelligence and security agency (AIVD) had been spying on the firm since 2003, listening to calls with clients and third parties. The Ministry considered, however, that there was no need to change the procedure for the secret services to tap telephone lines.

The law firm considered that privileged conversations with clients should not be tapped without prior judicial authorisation; and that there should be a clear and

accessible procedure involving a judge, each time the secret services want to conduct surveillance on defence lawyers.

The law firm started a court action against both the Minister of the Interior and the Minister of Defence, in order to introduce a prior judicial authorisation for each surveillance procedure involving lawyers. The CCBE intervened as a third party.

On 1st July, the Court gave its verdict, ordering the Dutch government **to stop within six months all interception of communications between clients and their lawyers under the current regime.** The Dutch State was given **six months to adjust the policy** of its security agencies **regarding the surveillance of law-yers and to ensure that an independent body will exercise effective prior control.**

The court also ruled that information obtained from surveillance of lawyers **may**

only be released to the public prosecutor if an independent body has examined it, and under what conditions, security agencies were allowed to conduct surveillance. The Court held that the current safeguards were inadequate in view of the case law of the European Court of Human Rights.

This decision could therefore impact the intelligence-gathering policies of other Member States of the Council of Europe.

The Ministry of the Interior announced on 14 July that the State would appeal the ruling. The CCBE will submit its written observation in August in view of the hearing scheduled for September.

Read more: [\[Dutch Intelligence Service \(AIVD\) taps Prakken d'Oliveira lawyers\]](#) [\[CCBE takes mass surveillance to court\]](#) [\[CCBE wins case against the Dutch state on surveillance of lawyers\]](#)

REQUESTING STRONG, INDEPENDENT SAFEGUARDS FOR DOMESTIC INTELLIGENCE GATHERING

On July 23rd 2015, the French Constitutional Council (Conseil constitutionnel) gave a pass to the French Government bill on intelligence, finding the bill constitutional overall and only censoring some articles. The CCBE intervened before the Council as a third party by request of the French National Council of Bars, focusing on potential threats to the confidentiality of lawyer-client communications in the text.

The bill allows intelligence services to intercept private communications "in order to defend and promote the fundamental interests of the nation". The CCBE expressed her concerns as regards the broad formulation of some public interest reasons justifying interceptions and the absence of any independent judicial control mechanism.

The use of intelligence-gathering methods can be authorized only by the Prime Minister, after a body called the National Commission of Intelligence Techniques Control (CNCTR) has provided its opinion.

The Council followed one of the requests of the CCBE by censoring a special emergency procedure to intercept communications in case of "urgent threats" without any prior authorisation. As a consequence,

and as requested by the CCBE, this procedure will not be applied to the surveillance of lawyers. The Council however validates the use of mass electronic surveillance of private communications using algorithms. It considers that metadata are not covered by the privacy of communications. The CCBE requested that this surveillance be limited to storing only data which may reveal a potential threat, without storing entire citizens' connection data for later use.

The task of posterior judicial review is given to the supreme administrative court, the Council of State (Conseil d'État), which together with the CNCTR must check the proportionality of infringements to the principle of professional secrecy.

However, for this review to be effective, the CCBE considers to be imperative that a lawyer appointed by the plaintiff be allowed to discuss evidence, even classified evidence presented by intelligence services.

Read more: [\[The CCBE has intervened before the French Constitutional Council to defend the confidentiality of communications between lawyers and their clients\]](#)

UPCOMING EVENTS

- 10-11/09:** *CCBE Standing Committee, Brussels*
- 17-18/09:** *Polish Ukrainian Legal Days III, Kiev*
- 18/09:** *25th Anniversary of the Independence of the Legal Profession in the Czech Republic, Prague*
- 18-20/09:** *Days of the Advocacy of the Bar of Federation of BiH, Mostar*
- 25/09:** *CCBE Belarussian Bar joint seminar on mediation, Minsk*
- 30/09:** *Seminar of The Law Society, London*