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Meeting: 1273 meeting (6-8 December 2016) (DH)

Item reference: Updated action plan (12/09/2016)

Communication from the Netherlands in the cases of Sanoma Uitgevers B.V., Telegraaf Media Nederland Landelijke Media B.V., Voskuil against the Netherlands (Applications No. 38224/03, 39315/06, 64752/01)

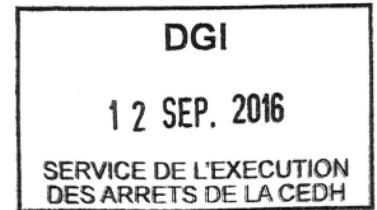
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Réunion : 1273 réunion (6-8 décembre 2016) (DH)

Référence du point : Plan d'action mis à jour

Communication des Pays-Bas dans les affaires Sanoma Uitgevers B.V., Telegraaf Media Nederland Landelijke Media B.V., Voskuil contre Pays-Bas (Requêtes n° 38224/03, 39315/06, 64752/01)
(anglais uniquement)



Joint action plan

of the Government of the Netherlands

for the implementation of

Application No. 64752/01

VOSKUIL v. the Netherlands

Judgment of 22 November 2007

Application No. 38224/03

SANOMA UITGEBERS B.V. v. the Netherlands

Judgment of 14 September 2010

and

Application No. 39315/06

TELEGRAAF MEDIA NEDERLAND

LANDELIJKE MEDIA B.V. AND OTHERS

v. the Netherlands

Judgment of 22 November 2012

Introduction

1. Having regard to the fact that the cases of *Voskuil v. the Netherlands* (hereafter: *Voskuil*), *Sanoma Uitgevers B.V. v. the Netherlands* (hereafter: *Sanoma*) and *Telegraaf Media Nederland Landelijke Media B.V. and others v. the Netherlands* (hereafter: *Telegraaf*), as described below, concern the issue of protection of journalists' sources, the Government of the Netherlands, at the request of the Execution Department of the Committee of Ministers, decided to present a joint action plan.
2. With reference to the standard classification procedure, the Government of the Netherlands wishes to present its action plan with a view to informing the Committee of Ministers about the measures taken to execute the judgments.

Case descriptions

Voskuil v. the Netherlands

3. On 26 October 2000 an application was lodged by a journalist, Koen VOSKUIL, alleging that, in violation of article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, he was denied the right, as a journalist, not to disclose his source of information for two newspaper articles which appeared in September 2000 in the newspaper *Spits* and that the authorities detained him in order to compel him to do so. He also alleged that his detention was not in accordance with a procedure prescribed by law, in breach of article 5, paragraph 1 of the Convention.
4. In its judgment of 22 November 2007 on this application the European Court of Human Rights held, unanimously, that there had been a violation of article 10, paragraph 1 of the Convention as regards the measures taken by the Government of the Netherlands to learn the identity of the applicant's source. The Court found that the Government's interest in knowing the identity of the applicant's source had not been sufficient to override the applicant's interest in concealing it.
5. The Court further held, unanimously, that there had been a violation of article 5, paragraph 1 of the Convention as regards the Government's failure to provide the applicant with a written copy of his detention order three days after his hearing and not within 24 hours in accordance with article 224 of the Code of Criminal Procedure.

Sanoma Uitgevers B.V. v. the Netherlands

6. On 1 December 2003 SANOMA UITGEVERS B.V. lodged an application complaining that they had been compelled to disclose information to the police that would have enabled their journalists' sources to have been revealed, in violation of their right to receive and impart information as guaranteed by article 10 of the Convention.
7. In its judgment of 14 September 2010 on this application the Court held, unanimously, that there had been a violation by the Netherlands of article 10, paragraph 1 of the Convention in that, although the interference with the applicant's company freedom to receive and impart information had a statutory basis in article 96a, paragraph 3 of the Code of Criminal Procedure, there was no procedure with legal safeguards available to the applicant company to enable an assessment as to whether the interests of the criminal investigation overrode the public interest in the protection of journalistic sources.
8. Furthermore, the Court held, unanimously, that the Netherlands was to pay the applicant company within a period of three months EUR 35,000 (thirty-five thousand euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses.

Telegraaf Media Nederland Landelijke Media B.V. and others v. the Netherlands

9. On 29 September 2006 UITGEVERSMAATSCHAPPIJ DE TELEGRAAF B.V., currently called Telegraaf Media Nederland Landelijke Media B.V., and two journalists of De Telegraaf, Joost DE HAAS and Bart MOS, lodged an application alleging a violation of article 10 of the Convention in that measures had been taken against them in order to identify their journalistic sources. The second and third applicants alleged in addition that they had been victims of a violation of article 8 of the Convention resulting from the use of special powers of surveillance.
10. In its judgment of 22 November 2012 on this application the Court held, unanimously, that there had been a violation by the Netherlands of articles 8 and 10 of the Convention as regards the use by the General Intelligence and Security Service (AIVD) of special powers against the second and third applicants, as journalists, with a view to discovering the journalistic sources and, by five votes to two, that there had been a violation of article 10 of the Convention as regards the order for the surrender of documents from which journalistic sources might have been identifiable addressed to the first applicant.
11. Furthermore, the Court held, unanimously, that the Netherlands was to pay the applicants, within three months from the date on which the judgment became final in accordance with article 44 § 2 of the Convention, EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses.

Individual measures

Voskuil v. the Netherlands

12. The Court did not award any just satisfaction in this case. The applicant did not make a claim in respect of pecuniary or non-pecuniary damage under article 41 of the Convention.
13. The Government of the Netherlands is of the opinion that no individual measures are necessary.

Sanoma Uitgevers B.V. v. the Netherlands

14. The amount of EUR 35,000, imposed by the Court, was transferred to the account of the applicant company's legal representative on 7 October 2010, i.e. well within the period of three months which the Court set out in its judgment. The applicant did not make a claim in respect of pecuniary or non-pecuniary damage under article 41 of the Convention.
15. The Government of the Netherlands is of the opinion that no further individual measures are necessary.

Telegraaf Media Nederland Landelijke Media B.V. and others v. the Netherlands

16. The amount of EUR 60,000, imposed by the Court, was transferred to the account of the applicants' legal representatives on 20 February 2013, i.e. well within the period of three months from the date on which the Court's judgment became final. The applicants did not make a claim in respect of pecuniary or non-pecuniary damage under article 41 of the Convention.
17. The Government of the Netherlands is of the opinion that no further individual measures are necessary.

General measures

18. The Court's judgment in the case of *Voskuil* prompted the Government to introduce new legislation. A bill has been prepared which proposes to add a new article to the Code of Criminal Procedure.¹ The article would give witnesses to whom information has been entrusted within the framework of the professional reporting of news or the gathering of information for that purpose, or the reporting of news within the framework of participation in public debate, the right to refuse to give evidence or identify sources of information. Such a

right would be more limited than that enjoyed by the categories enumerated in articles 217, 218 and 219 of the Code of Criminal Procedure, as it would be subject to the investigating judge finding that no disproportionate harm to an overriding public interest would result from such a refusal.

19. The bill also includes an amendment to article 96a of the Code of Criminal Procedure to the effect that journalists may refuse to comply with an order to surrender an object if such surrender would violate their duty to maintain confidentiality in connection with the protection of sources. A journalist's invocation of that provision may be dismissed by the investigating judge if he takes the view that leaving the questions unanswered would be disproportionately prejudicial to a more compelling interest. In that case, the surrender of an object will be subject to prior assessment by the investigating judge and no longer depend solely on the assessment of the investigating officer. The proposed amendments therefore also aim to address the concerns expressed by the Court in its judgments in the cases of *Sanoma* and *Telegraaf*. The Minister of Security and Justice has added a provision to the existing bill on protecting journalists' sources in criminal cases (on which the Council of State has already issued an advisory opinion) tightening up the requirements for applying coercive measures subject to prior judicial assessment against those entitled to decline to give evidence subject to prior judicial assessment. On 17 September 2014 a legislative proposal was submitted to the House of Representatives. Subsequently, on 31 August 2015 the proposal was amended to strengthen the envisaged protection. The parliamentary debate, previously scheduled for February 2016, has been moved to September 2016 due to a backlog of pending legislative proposals in the House of Representatives.
20. Following the Court's judgment in the case of *Telegraaf* the Government sent a letter dated 7 December 2012² to the House of Representatives of the States General explaining in detail the Court's judgment and setting out the measures the Government intended to take in response. The letter also announced that both the Intelligence and Security Services Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002*) and the Code of Criminal Procedure would be amended. The first proposal concerns the use of special powers by the Dutch intelligence and security services against journalists in order to identify their journalistic sources. The second proposal aims at establishing the right to protect sources in the context of free news gathering and concerns the procedures to be followed during investigation and prosecution of criminal cases.
21. At this moment a legislative proposal to amend the Intelligence- and Security Services Act 2000 lies before the House of Representatives. The legislative proposal stipulates that if the Dutch Intelligence and security services intend to use special powers against journalists in order to identify their journalistic sources directly or indirectly, they must obtain the consent

¹ Article 218a of the Code of Criminal Procedure.

² Parliamentary Papers, House of Representatives 2012/2013, 30 977, no. 49.

of The Hague district court (*rechtbank*) in advance.³ Meanwhile the Government has, in response to an independent evaluation of the current Act, decided to prepare a legislative proposal for a completely new Act that will incorporate the aforementioned proposal. This legislative proposal will be submitted to the House of Representatives before the end of 2016. For the short term, the Government has provided for a temporary provision implying that, if an intelligence and security service has the intention to use special powers against a journalist in order to identify his journalistic sources, the service has to obtain the binding advice of an independent committee of jurists (*Tijdelijke regeling onafhankelijke toetsing bijzondere bevoegdheden Wiv 2002 jegens advocaten en journalisten*).⁴ If that committee considers the use of special powers unlawful, the use of special powers is prohibited. This temporary provision will expire at the moment the new Act enters into force.

22. As regards to the violation of article 5, paragraph 1, of the Convention in the Court's judgment in the case of *Voskuil* no general measures are necessary since the violation resulted from an erroneous application of article 224 of the Code of Criminal Procedure.

Additional information

23. The Court's judgment in the case of *Voskuil* was published in:

- a. European Human Rights Cases (EHRC), 2008, no. 20, with commentary from A. Nieuwenhuis;
- b. Nederlandse Jurisprudentie (NJ), 2008/216, with commentary from E.J. Dommering.

24. The Court's judgment in the case of *Sanoma* was published in:

- a. Nederlandse Jurisprudentie (NJ), 2011/230, with commentary from E.J. Dommering and T.M. Schalken
- b. Nederlands Juristenblad (NJB), 2010/1986.

25. Finally, the Court's judgment in the case of *Telegraaf* was published in:

- a. *Mediaforum* 2013-I, with commentary from Wouter Hins;
- b. European Human Rights Cases (EHRC), 2012, no. 14, with commentary from J. Verbaan;
- c. Nederlandse Jurisprudentie (NJ), 2013/252, European Human Rights Cases (EHRC), 2008, no. 20, with commentary from E.J. Dommering.

³ Parliamentary Papers, House of Representatives 2014/2015, 34 027.

⁴ Government Gazette (*Staatscourant*) of 23 December 2015, no. 46477.

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Conclusion

26. The Government is of the opinion that it will have executed the Court's judgments once the draft legislation described above has been adopted, of which it undertakes to inform the Committee of Ministers in due time.

The Hague, 12 September 2016

A handwritten signature in blue ink, appearing to read 'R. Böcker', with a long horizontal stroke extending to the right.

Roeland Böcker

Agent for the Government of the Netherlands