[NL] Dutch legislator proposes two bills on the protection of journalistic sources

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On 15 and 17 September 2014, the Dutch legislator issued two bills on the protection of journalistic sources. The bills follow several judgments against the Netherlands for violating Article 10 of the European Convention on Human Rights in cases concerning journalists and source protection.

With three violations on the matter in the last seven years (Voskuil v. the Netherlands (2007), see IRIS 2008-4/2); Sanoma Uitgevers B.V. v. the Netherlands (2010), (see IRIS 2010-10/2); and Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands (2012), (see IRIS 2013-2/2), the Dutch government has been repeatedly criticised by the European Court of Human Rights for not having legislation in place that legally guarantees the protection of journalistic sources. Therefore, with these new bills, source protection issues in the Netherlands will be regulated under two laws.

First, the legislator has proposed a bill to amend The Intelligence and Security Services Act 2002 (Wet op de inlichtingen- en veiligheidsdiensten 2002, Wiv). The proposed amendment contains a requirement for a judicial and binding review before intelligence and security services (Algemene Inlichtingen- en Veiligheidsdienst, AIVD, and Militaire Inlichtingen- en Veiligheidsdienst, MIVD) may apply their special powers to journalists in order to uncover journalists' sources. Article 19 of the Act only requires permission from the relevant Minister, or the relevant head of a service on behalf of this Minister, for the exercise of such a power. However, for the exercise of this power against a journalist in order to uncover his or her source, the newly proposed Article 19a now requires permission from the court of The Hague. This proposal addresses the main issue in the judgments against the Netherlands in Telegraaf Media, i.e. the lack of an independent and binding review by a judge or other independent body before the exercise of special powers by intelligence and security services against journalists and news media.

The second proposed bill amends the Dutch Code of criminal procedure (Wetboek van Strafvordering, Sv). With this proposed amendment, the right of source protection for free newsgathering in criminal cases and the journalistic right to non-disclosure (verschoningsrecht) are laid down in law. The new Article 218a ensures that journalists and commentators (publicisten) have a right to non-

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disclosure upon questions with regard to the origin of the information they receive from sources who wish to remain anonymous. Also, other provisions of the Code are amended, for example, on search and seizure. Thus, a search of a newspaper's office shall generally only be allowed with the intervention of the investigating judge. This brings Dutch law in line with the Sanoma judgment, which normally requires review by an independent body before seizure of journalistic material. The proposal further addresses the judgment against the Netherlands in Voskuil, which concerned a court order to detain a journalist for non-compliance with a judicial order to reveal the identity of his source (gijzeling). The measures of the authorities were considered so far-reaching that they would have a chilling effect on people who might want to share information with the press in the future. The interest of a democratic society in ensuring free and unhampered press reporting was considered to weigh heavily in that case.

What is explicitly excluded from both bills is a legal definition of the notion of 'a journalist'. However, the Explanatory Memorandum of the second proposed bill emphasises that source protection in the context of criminal procedures should not be limited to those that are involved in reporting professionally or on a paid basis. It is stated that the public debate is no longer confined to the traditional media but also takes place outside this structure, for example, on websites and blogs. Contrary to the Wiv, which only mentions 'journalists' in its new Article 19a, the new Article 218a Sv therefore also mentions 'commentators' that engage in public debate as eligible for a right of non-disclosure in criminal procedures.

Wetsvoorstel tot wijziging van de Wet op de inlichtingen- en veiligheidsdiensten 2002 in verband met de invoering van een onafhankelijke bindende toets voorafgaand aan de inzet van bijzondere bevoegdheden jegens journalisten, welke gericht is op het achterhalen van hun bronnen, 15 september 2014

http://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail.jsp?id=2014Z15828&dossier=34027

Bill to amend The Intelligence and Security Services Act 2002 with regard to the introduction of an independent and binding review prior to exercising special powers against journalists, in order to discover their sources, 15 September 2014

Wetsvoorstel tot wijziging van het Wetboek van Strafvordering tot vastlegging van het recht op bronbescherming bij vrije nieuwsgaring (bronbescherming in strafzaken), 17 september 2014

http://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail.jsp?id=2014Z16038&dossier=34032

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Bill to amend the Dutch Code of criminal procedure in order to establish in law the right to source protection for free newsgathering (source protection in criminal procedures), 17 September 2014

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