

Belgium: Law on the protection of journalistic sources may inspire other countries

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In Belgium the discussion about the (lack of) protection of journalistic sources has often been on, - and mostly after short time again off -, the political agenda¹. Several law proposals have been introduced in Belgian Parliament since 1984², but never a relevant political majority was found to support one of these law proposals. New initiatives to elaborate a legal framework for the protection of journalistic sources were taken in 2002³.

In the judgment in the case of *Ernst and others v. Belgium* (ECtHR 15 July 2003) the European Court of Human Rights found that the Belgian authorities have violated Article 10 of the European Conventions (freedom of expression). The ECtHR considered a series of interferences by the judicial authorities which failed to respect the confidentiality of journalistic sources as unnecessary and disproportionate and hence not meeting the conditions of Article 10 § 2 of the Conventions. The judgment gave a new and important support for the journalists' claim and their professional organisations requesting for a legal framework to protect journalistic sources. A firm demand for such a legal framework was put on the agenda again after the searches at the office and in the home of *Stern*-journalist Hans Martin Tillack in 2004. In a judgment of 1 December 2004, the Belgian Supreme Court (*Hof van Cassatie / Court de Cassation*) was of the opinion that as part of a legitimate investigation into bribery of a civil servant of the EU, the searches at H.M. Tillack's home and in the Brussels' office of *Stern* were not to be considered as illegal, nor violated Article 10 of the European

¹ For an overview see D. VOORHOOF, *Recht op informatie, garingsvrijheid en een zwijgrecht voor de journalistiek*, Gent, Liga voor Mensenrechten, 1985; B. DEJEMEPPE, "Protection des sources ou secret professionnel. D'un faux problème à une vraie responsabilité", *Journ. Proc.* 1991/196, 33-35; M. BUYDENS, "Droits et obligations du professionnel de l'information à l'égard de ses 'sources'", *Journ. Proc.* 1993/247, 10; J. VELU, *Beschouwingen over de Europese regelgeving inzake betrekkingen tussen gerecht en pers*, R.W. 1995-1996, 273-308 (300-301); H. BOSLY, D. D'HOOGHE en D. VOORHOOF, *Justitie & Media, Drie pre-adviezen op vraag van de Minister van Justitie*, Brussel, 1995, C/45-47; J. CEULEERS, "Een zwijgrecht voor journalisten ? bis", R.W. 1996-1997, 975-977; P. TOUSSAINT, "Le secret des sources du journaliste", *Rev.Trim.Dr.Homme* 1996, 452-457; A. BORMS, "Het arrest Goodwin : een mijlpaal in de mediajurisprudentie omtrent het bronnengeheim", *ICM Jaarboek Mensenrechten 1995-1996*, 292-299 en D. VOORHOOF, "Het journalistiek bronnengeheim voortaan niet enkel een deontologisch principe, maar ook een afdwingbaar recht", *AM* 1996/3, 355-360 and D. VOORHOOF, "Naar een wettelijke erkenning van het journalistiek bronnengeheim ?", in A. HENDRIKS, J. HUYPENS en J. SERVAES (eds.), *Media en Politiek. Liber Memorialis Luk BOONE*, Leuven, Acco, 1998, 105-113.

² *Parl. St. Kamer* 1984-1985, nr. 1032/1; *Parl. St. Kamer* 1984-1985, nr. 1170/1; *Parl. St. Kamer* 1984-1985, nr. 1196/1; *Parl. St. Kamer* 1985-1986, nr. 261/1-2; *Parl. St. Kamer* 1986-1987, nr. 786/1-2; *Parl. St. Kamer*, 1986-1987, nr. 800/1; *Parl. St. Senaat B.Z.* 1998, nr. 94/1; *Parl. St. Kamer B.Z.* 1988, nr. 336/1; *Parl. St. Kamer* 1992-1993, nr. 1015/1 and *Parl. St. Kamer* 1995-1996, nr. 137/1.

³ Wetsvoorstel tot bescherming van de informatiebronnen van de journalist/Proposition de loi relative à la protection des sources d'information du journaliste, *Parl. St. Kamer* 2002-2003, nr. 2102/001 (G. Bourgeois, 28 October 2002) and *Parl. St. Kamer BZ* 2003, nr. 24/001 (G. Bourgeois, 25 June 2003). See also the law proposal "visant à accorder aux journalistes le droit au secret de leurs sources d'information", *Parl. St. Kamer BZ* 2003, nr. 111/001 (O. Maingain and M. Payfa).

Convention⁴. However, on 27 November 2007 the European Court of Human Rights found a violation of Article 10 by the Belgian authorities. A strong call for the protection of journalistic sources was also made on 26 January 2005 at a press conference organised by the newspaper *De Morgen*, after it was revealed that a judicial investigation had taken place with regard to the telephone traffic of one of its journalists Anne de Graaf. Also the organisation of Flemish professional journalists and *Reporters sans Frontières* protested sharply against the inspection of reporters' phone records as a manifest disrespect for the confidentiality of journalistic sources. The Court of First Instance of Brussels, in a judgment of 29 June 2007, convicted the Belgian State for infringement of the journalist's freedom of expression as protected by Article 19 of the Belgian Constitution and Article 10 of the European Convention. It also recognised firmly the importance of the protection of journalistic sources.⁵

After long debates in Parliament, finally the law on the protection of journalistic sources of 7 April 2005 was promulgated and came into force on the 7th May 2005. The new law is very much in line with the Committee of Ministers' Recommendation No. R (2000)7 of 8 March 2000 to member States on the rights of journalists not to disclose their sources. The law not only formulates a broad notion of who is a journalist and what is protected information, it also reduces substantially the possibility of compelling journalists to reveal their sources, as well as any kind of investigative measures taken by the judicial authorities to circumvent the right of journalists not to reveal their sources. A disclosure order is only in accordance with the law if there are no alternative means of access and if the information in the possession of the journalist is crucial for the prevention of crime that constitutes a serious threat to the physical integrity of one or more persons. Journalists exercising their right to protection of sources cannot be prosecuted for "fencing" (*heling / recel*), nor for complicity in the offence of breach of professional secrecy. In a judgment of 7 June 2006 the Constitutional Court (former *Arbitragehof/Court d'Arbitrage*) confirmed the constitutionality of the law on protection of journalistic sources, broadening for that purpose however the application of the law "*ratione personae*"⁶.

The protection of sources as referred to in Article 3 is (now) guaranteed in respect of the following **persons** (Article 2):

- 1° *Anyone who directly contributes to the gathering, editing, production or distribution of information for the public by way of a medium*
- 2° *Editorial staff, which means anyone who in the exercise of his functions may be in a position to have knowledge on information that can lead to the revelation of a*

⁴ Supreme Court 1 December 2004, www.juridat.be. See also European Court of First Instance (President) 15 October 2004, Case T-193/04 R, Hans-Martin Tillack v. Commission of the European Communities, available at <http://curia.eu.int>

⁵ ECtHR 27 november 2007, Tillack v. Belgium and Court of First Instance Brussels 29 June 2007, A&M 2007, 500. For more updated information, see D. VOORHOOF (ed.), *Het journalistiek bronnengeheim onthuld*, Brugge, Die Keure, 2008, to be ordered at http://www.diekeure.be/uitgeverij/juridisch/catalogue/detail_nl.phtml?id=762&bestelcode=202%20085%20101

⁶ Constitutional Court 7 June 2006, nr. 91/2006, www.arbitrage.be, see also D. VOORHOOF, "Arbitragehof verruimt toepassing journalistiek bronnengeheim", *De Juristenkrant* 2006/132, 17.

source, regardless whether this is through the gathering, the editorial treatment, the production or the distribution of this information.

According to the new law, 'journalists' (in the broad sense of Article 2, 1^o) and members of the editorial staff have **a right to refuse the disclosure of information** upon request of the judicial authorities, in four different situations (Article 3):

- 1° if the information may reveal the identity of a source;*
- 2° if the information may reveal the nature or the origin of that information;*
- 3° if the information may reveal the identity of the author of a text or an audiovisual production;*
- 4° if the disclosure may reveal the content of the information and of the documents themselves, if that may lead to the informant being identified.*

Journalists or editorial staff can however exceptionally **be compelled by a judge to disclose information** revealing a source under the circumstances of Article 4 in as far as three cumulative conditions are fulfilled:

- 1° the information relates to crimes that constitute a serious threat to the physical integrity of one or more persons;*
- 2° the requested information is of crucial importance for the prevention of these crimes;*
- 3° and the requested information cannot be obtained in another way.*

According to Article 5 **detection measures and investigative measures** (such e.g. as searches, seizures and telephone tapping) shall not apply to data relating to information sources of journalists and editorial staff, unless the data may prevent the crimes referred to in Article 4 and subject to the conditions set out under that Article.

Article 6 stipulates that journalists and editorial staff (the persons referred to in Article 2) **cannot be prosecuted** under Article 505 of the Belgian Criminal Code when they are exercising their right to keep silent about their sources. Article 505 of the Criminal Code punishes *inter alia* those who receive or use documents which have been stolen or have been obtained by crime (e.g. after breach of the duty of professional secrecy by others).

Also in case of a breach of professional secrecy in the terms of Article 458 of the Criminal Code, the persons referred to in Article 2 **cannot be prosecuted** under Article 67, par. 4 of the Criminal Code when they are exercising their right to keep silent about their sources, which means that journalists and editorial staff in these circumstances cannot be prosecuted for complicity in the offence of breach of confidence.

Since May 2005 the Belgian law is now protecting journalistic sources in accordance with Article 10 of the European Convention on Human Rights and in application of the European Court's case law on this matter. The Belgian law can also inspire other countries to develop new standards of protection of journalistic, "having regard to the importance of the protection of journalistic sources for press

freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom”⁷.

⁷ ECtHR 27 March 1996, *Goodwin v. United Kingdom*, § 39.

Unofficial English translation, by Dirk Voorhoof (*)

Law on the protection of journalistic sources

Art. 1

This law regulates a subject-matter referred to in Article 78 (9) of the Constitution

(9) Article 78 of the Belgian Constitution refers to a competence of the federal parliament

Art. 2

The protection of sources as referred to in Article 3 is guaranteed in respect of the following persons:

1° anyone, who directly contributes to the gathering, editing, production or distribution of information for the public by way of a medium

2° Editorial staff, which means anyone who in the exercise of his functions may be in a position to have knowledge on information that can lead to the revelation of a source, regardless whether this is through the gathering, the editorial treatment, the production or the distribution of this information.

Art. 3

The persons specified in Article 2 have the right to keep silent about their sources. Except in the cases referred to in Article 4, they cannot be compelled to reveal their information sources or to communicate data, pre-recordings or documents that inter alia

1° may reveal the identity of their informants

2° may reveal the nature or origin of their information

3° may reveal the identity of an author of a text or audiovisual production

4° may reveal the content of information and of documents themselves, if that may lead to the informant being identified.

Art. 4

Only on request of a judge can the persons specified in Article 2 be compelled to reveal sources of information as referred to in Article 3, if they are of a kind to assist in the prevention of crimes that constitute a serious threat to the physical integrity of one or more persons, including the crimes referred to in Article 137 (9) of the Criminal Code that offend against the physical integrity. Such a request is only legitimate if the following cumulative conditions are fulfilled:

1° the requested information is of crucial importance for the prevention of these crimes;

2° the requested information cannot be obtained in another way.

(9) Article 137 of the Criminal Code refers to crimes of terrorism

Art. 5

Detection measures and investigative measures shall not apply to data relating to information sources of the persons referred to in Article 2, unless the data may prevent the crimes referred to in Article 4 and subject to the conditions set out under that Article.

Art. 6

The persons referred to in Article 2 cannot be prosecuted under Article 505 (9) of the Criminal Code when they are exercising their right to keep silent about their sources.

(9) Article 505 of the Criminal Code punishes inter alia those who receive or use documents which have been stolen or have been obtained by crime.

Art. 7

In case of a breach of professional secrecy in the terms of Article 458 (9) of the Criminal Code, the persons referred to in Article 2 cannot be prosecuted under Article 67, par. 4 (9) of the Criminal Code when they are exercising their right to keep silent about their sources.

(9) Article 458 of the Criminal Code punishes breach of the duty of professional secrecy.

(9) Article 67, par. 4 of the Criminal Code criminalises complicity in crime.

() With thanks to Marie McGonagle, Senior Lecturer in Law, National University of Ireland, Galway, Ireland.*

Wet van 7 april 2005 tot bescherming van de journalistieke bronnen

**B.S. 27 april 2005, err. 13 mei 2005,
gew. Grondwettelijk Hof 7 juni 2006 en Wet 9 mei 2006, B.S. 7 maart 2007**

Artikel 1. Deze wet regelt een aangelegenheid als bedoeld in artikel 78 van de Grondwet.

Art. 2. De bescherming van de bronnen als bepaald in artikel 3, genieten de volgende personen :

1° eenieder die een rechtstreekse bijdrage levert tot het verzamelen, redigeren, produceren of verspreiden van informatie voor het publiek via een medium;

(Art. 2, 1° gewijzigd door het arrest van het Grondwettelijk Hof van 7 juni 2006.

Oorspronkelijke versie: "1° *journalisten, dus eenieder die als zelfstandige of loontrekkende werkzaam is, alsook iedere rechtspersoon, en die regelmatig een rechtstreekse bijdrage levert tot het verzamelen, redigeren, produceren of verspreiden van informatie voor het publiek via een medium*")

2° redactiemedewerkers, dus eenieder die door de uitoefening van zijn functie ertoe gebracht wordt kennis te nemen van informatie die tot de onthulling van een bron kan leiden, ongeacht of dat verloopt via het verzamelen, de redactionele verwerking, de productie of de verspreiding van die informatie.

Art. 3. De personen bedoeld in artikel 2 hebben het recht hun informatiebronnen te verzwijgen.

Met uitzondering van de gevallen bedoeld in artikel 4, kunnen zij er niet toe worden gedwongen hun informatiebronnen vrij te geven en inlichtingen, opnames en documenten te verstrekken die onder meer :

1° de identiteit van hun informanten kunnen bekendmaken;

2° de aard of de herkomst van hun informatie kunnen prijsgeven;

3° de identiteit van de auteur van een tekst of audiovisuele productie kunnen bekendmaken;

4° de inhoud van de informatie en van de documenten zelf kunnen bekendmaken, indien daarmee de informant kan worden geïdentificeerd.

Art. 4. De personen bedoeld in artikel 2 kunnen enkel op vordering van de rechter ertoe gedwongen worden de informatiebronnen bedoeld in artikel 3 vrij te geven, indien die van aard zijn misdrijven te voorkomen die een ernstige bedreiging opleveren voor de fysieke integriteit van één of meer personen, daarin begrepen de misdrijven bedoeld in artikel 137 van het Strafwetboek, in de mate zij de fysieke integriteit in het gedrang brengen, en indien de volgende cumulatieve voorwaarden vervuld zijn :

1° de gevraagde informatie is van cruciaal belang voor het voorkomen van deze misdrijven;

2° de gevraagde informatie kan op geen enkele andere wijze verkregen worden.

Art. 5. Gegevens die betrekking hebben op de informatiebronnen van de personen bedoeld in artikel 2, mogen niet het voorwerp uitmaken van enige opsporings- of onderzoeksmaatregel, tenzij die gegevens kunnen voorkomen dat de in artikel 4 bedoelde misdrijven worden gepleegd, en met naleving van de daarin bepaalde voorwaarden

(Art. 5 gewijzigd bij Wet 9 mei 2006, B.S. 7 maart 2007. Oorspronkelijke versie: "Opsporings- of onderzoeksmaatregelen zoals fouilleringen, huiszoekingen, inbeslagnemingen, het af luisteren en opnemen van telefoongesprekken mogen niet slaan op gegevens die betrekking hebben op de informatiebronnen van de

personen bedoeld in artikel 2, tenzij die gegevens kunnen voorkomen dat de in artikel 4 bedoelde misdrijven worden gepleegd, en met naleving van de daarin bepaalde voorwaarden”).

Art. 6. De personen bedoeld in artikel 2 kunnen niet op grond van artikel 505 van het Strafwetboek worden vervolgd als zij hun recht uitoefenen om hun informatiebronnen te verzwijgen.

Art. 7. Ingeval het beroepsgeheim in de zin van artikel 458 van het Strafwetboek wordt geschonden, kunnen de personen bedoeld in artikel 2 niet op grond van artikel 67, vierde lid, van het Strafwetboek worden vervolgd als zij hun recht uitoefenen om hun informatiebronnen te verzwijgen.

Bewerking, D. Voorhoof, February 2008