



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

The formal instruction on the “Destruction of intercepted conversations with persons enjoying the privilege of non-disclosure” issued by the Board of Procurators General on 12 March 2002 (in its relevant part)

“Background

In December 2001, summary injunction proceedings took place which had been initiated by, amongst others, the Netherlands Bar Association and the NVS against the Netherlands State (the Minister of Justice). The central subject of these proceedings was the implementation of (former) Article 125h and Article 126aa of the CCP, insofar as these provisions concerned the destruction of intercepted communications with persons enjoying the privilege of non-disclosure.

It appeared [in these proceedings] that the implementation of the statutory provisions has not been flawless in all cases. For this reason the Board has found it appropriate, in addition to the Handbook on Special Investigative Powers (*Handboek bijzondere opsporingsbevoegdheden*), to elaborate the rules further in an instruction. This instruction has the aim, by way of a step-by-step procedure, to ensure a full and uniform implementation of the legal rules.

Summary

This instruction seeks, by giving procedural rules, to ensure a uniform implementation of Article 126aa § 2 of the CCP and Articles 4 and 5 of the Decision on the storage and destruction of items not added to the case file.

Criminal Procedure

A summarised overview of the relevant statutory framework is appended. A more elaborate overview can be found in paragraph 5.3 of the Investigative Practice Handbook (*Handboek voor de opsporingspraktijk*). For the purposes of clarity and accessibility, this framework is set out below in a step-by-step manner. For each step, a distinction has been made, as far as possible, between each of the actors involved. This format has been chosen in order to set out, in an unequivocal and easily traceable manner, the tasks and responsibilities of the different officials involved. For each step and, where necessary, an explanation is given.

A. The procedure scheme

1. The investigating officer (*opsporingsambtenaar*), assigned the task of transcribing [in a written record] intercepted communications, thinks that he/she has come across a communication with a privileged person (*geheimhouder*).
2. [This] officer processes the contents of the communication for the purposes of a notification to the public prosecutor.
3. [This] officer informs the [criminal investigation] team-management (*teamleiding*) without delay of the finding.
4. The team-management instructs that the finding be notified without delay to the public prosecutor.
5. The public prosecutor assesses whether the contents of the communication contains information conveyed to or by a privileged person (Article 126aa of the CCP).
6. If so: The public prosecutor immediately issues a written order to destroy the contents of the communication. This involves both the processed conversation and the communication recorded on other data carriers. The public prosecutor transmits this written order to the team-management.
7. The team-management is responsible for the implementation of this order.
8. The team-management ensures the implementation of the order for destruction insofar as this relates to intercepted communication[s] held by the criminal investigation department (*recherche*). This also includes the communication[s] transcribed in a written record.
9. The team-management draws up a written record of destruction. This record shall not, of course, contain any of the information referred to in Article 126aa of the CCP.
10. The Systems Manager (*beheerder*) of the interception centre ensures the destruction of the material in the interception system and the material already stored on a data carrier.
11. The Systems Manager of the interception centre draws up a written record of destruction.
12. The Systems Manager of the interception centre transmits the written record of destruction to the team-management. This record shall not, of course, contain any of the information referred to in Article 126aa of the CCP.
13. The team-management transmits both written records of destruction to the public prosecutor.

B. Explanations about the scheme

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Ad 2. ... The processing of the communication has the aim to create the possibility for the public prosecutor to determine whether the regime of Article 126aa of the CCP applies. The wording “processing” (*verwerken*) instead of “transcribing” (*uitwerken*) has been chosen because the entire communication does not *per se* have to be transcribed in the written record. The transcription must take place insofar as it is necessary to enable the public prosecutor to exercise his statutory task. How far that transcription should go cannot be indicated in general but is dependent on the circumstances of each case. ... Noting the ratio of the law, it is obvious that no more than is strictly necessary should be transcribed. It is also evident that these data should

not, in the meantime, be accessible via any generally accessible automated system. The circle of persons who may take notice of these transcriptions must, of course, remain as small as possible.

When the public prosecutor, on the basis of a partial transcription, cannot assess whether the regime of Article 126aa § 2 of the CCP applies, he can instruct the investigation officer to transcribe the further [contents of the] communication in a written record. This may also take place in view of the last sentence of Article 126aa § 2 of the CCP. After the prior authorisation of the investigating judge, written records and other objects may indeed be added to the case file, insofar as these contain information conveyed to or by a privileged person that does not fall within the ambit of the privilege of non-disclosure. Although in practice this only occurs rarely, an (initially) full transcription is a requirement for this. ...

Ad 5. The mere fact that a privileged person has taken part in an intercepted conversation is not exclusively decisive for the assessment whether [that] communication falls under the regime of Article 218 of the CCP, and thus under Article 126aa of the CCP. For this, the contents of the communication are of decisive importance. The public prosecutor must thus, either in full or in part, become aware of the contents of the communication.

Ad 6. The order for destruction is in principle given for each intercepted communication. It is however feasible that the public prosecutor, in the course of a tap and in respect of a specifically defined privileged person (*geïndividualiseerde geheimhouder*), issues a generic order for the destruction of all communications in which this privileged person has participated. ... This does imply that each intercepted communication, in which the privileged person concerned has participated, must be separately destroyed and a written record thereof drawn up.

Ad 8 and 10. ... the notions “other objects” and “to destroy” require further explanation.

The “other objects” are also designated as “data carriers”. This may concern the automated storage of a text, for instance of the written record on the transcription of the communication (Article 5 § 1 of the Decision), or the storage in any form of other data, such as audio or visual materials (Article 5 § 2 of the Decision). Conceivably, other objects and data carriers could be, for instance, tapes, diskettes, CD-ROMs, optical disks, hard disks and the like.

According to the Decision, destruction does not mean that such objects must be physically destroyed. Article 5 of the Decision qualifies as destruction the processing of the data carrier/object in such a manner that the data concerned are no longer recoverable (*kenbaar*). As appears from the explanation to the Decision, the mere deletion of the [data] file is insufficient. The data carrier must be processed in such a manner that the data to be destroyed can no longer be accessed ...”