

Dear colleagues,

Please allow me to address the word to you in relation to threats to the rights of lawyers, but more particular threats to the independence of criminal defence lawyers. To me, the main rights of a criminal defence attorney are his professional secrecy and his independence.

It might come as a shock for many of you, but our independence is at stake, at least from a Belgian point of view. You will learn that I am not in favour of this evolution, but it is of course a good thing for this presentation, because otherwise my presentation would probably be over yet.

You all will agree that it is fashionable to question lawyers' privileges such as the client-lawyer confidentiality, the professional secrecy etc. and that people in general and governments in particular tend to want to break in to these privileges.

However, from a criminal defence point of view certain rights have to be safeguarded and protected in order to be able to duly represent our clients and guarantee a fair trial for every suspect.

Aside from the general rights of defence for a suspect, lawyers' privileges are crucial to guarantee such a fair trial. If an attorney who accepts to defend a client could be interrogated, if his premises – both office and private – could be sought, the chances to get an actual fair trial decrease and might be totally excluded.

Nevertheless, the Belgian legislative bodies have passed the Act of February 4th, 2010 in order to increase the powers of the Belgian State Security, the so-called Special Intelligence Act. Those of you who were present in Budapest might remember me mentioning this Act during my presentation, but given the title of our current conference – “Threats to the independence of lawyers” – this Act deserves a more detailed attention.

I will hereby give a short outline on the content of the aforementioned Act and the actual threats to our independence which are caused by this rather new legislation.

First of all, allow me to emphasize that several special investigative measures have been introduced a long time ago in Belgium to allow the regular

investigators (Public Prosecutor, Judge of Instructions) to compete with criminals who are trying to outsmart them. You will all think of telephone taps, observation of suspects/premises with technological tools, search of private and public places, etc.

All these measures are available to the Belgian investigators, but procedural safeguards come along with them to guarantee a fair trial and respect for the rights of defence. There is a controlling body to check whether a special investigative measure that was used, has been used correctly and with respect to the rights of defence. The Chamber of Accusations, which consists of impartial and independent magistrates, exercises this control.

The State Security however also received the same powers the investigators have and can use special and extraordinary investigative measures without any procedural safeguards.

Prior to the Law of 2010, the State Security already had certain tools available, like retrieving all sorts of information, consulting certain sources and observation of public places. The Law of 2010 expands the powers of the State Security quite heavily with special investigative measures. The following can be mentioned:

- observation with technological aid
- searching public and private places which are open for the public
- identification of recipients or senders of mail
- identification of users of electronic communication

These extra tools available to the State Security might not surprise you. It really are the additional "extraordinary" investigative measures that are remarkable:

- observation in houses
- foundation of fake companies
- searching private places and houses
- gathering banking information
- interception of mail
- hacking computers

- tapping phone communication

If compared to the competences of the regular investigative bodies, most of them are the same, but the difference is that the State Security has less restrictions when exercising these powers.

The activities of the State Security are only controlled by the "Standing Committee I", which is an independent body, consisting of the Attorney-general of Liège, the Attorney-general of Ghent and an administrative member.

This committee will report to a special commission of the Senate, which also exercises a certain control, but this control is rather limited in everyday practice.

Only two principles should be taken into account by the State Security when it assesses whether a special or extraordinary investigative measure is going to be used:

- proportionality: this means that the severity of the threat and the measure used should match
- subsidiarity: this means that the measures can only be used when another – less firm – measure is insufficient to reach the same goal

These principles are of course open for interpretation and it won't be surprising that the State Security is rather mild for itself when applying them.

The aim of the State Security is of course to fight against terrorism and criminal organizations. Every crime that is being revealed by the State Security – even tax evasion – will be reported by the State Security to the office of the Public Prosecutor.

Every element that was investigated and revealed can be added to the criminal file and will be used as evidence against a suspect without any procedural safeguard.

If the Public Prosecutor or Judge of Instructions has used a search warrant, an observation or a telephone tap, the correctness of the used measures will be controlled prior to the actual criminal proceedings and when found irregular,

all the documents relating to the measure will be banned from the criminal file and can not be used as evidence.

Aside from the rights of defence for suspects, which are questionable and probably absent when the State Security intervenes, the consequences for our profession in particular are both interesting and frightening.

After giving you a more or less general scope of this Special Intelligence Act to expand the powers of the State Security, I will now give you a short outline on the threats to the independence of lawyers as a result of this Law.

Exercising the aforementioned measures clearly could conflict with the professional secrecy of doctors, journalists and lawyers. Therefore, the Law of 2010 contains specific provisions in relation to these professions with a professional secrecy.

One would expect that the competences of the State Security would be very limited towards lawyers, but when reading the Law, the contrary shows.

The Law mentions that the special and extraordinary measures can be used against lawyers and information can be obtained, analysed and exploited, if the State Security has "serious" indications that the lawyer is involved or collaborates with the development of a potential threat against the internal security of the State and the continuation of the democratic and constitutional order, the external security of the State, the international commerce, the scientific and economical potential or every other crucial interest of the country.

The only safeguards are that not only the extraordinary but also the special investigative measures are subject to the prior advice of an administrative commission. When extraordinary measures are actually being executed, the President of the commission or his representative has to be present. Furthermore, the Dean of the Bar can be informed about the application of specific or extraordinary measures.

These safeguards however don't change the fact that lawyers can be subject to very severe investigative measures, while the State Security can report any potential crime to the Public Prosecutor when exercising its powers.

For example, the following measures can be taken:

- A search of the professional and private places of the lawyer. His office

can be searched without his knowledge, while the Dean of the Bar or the President of the National Professional Organization can be informed by the State Security, but this is just a possibility, not a necessity or obligation!

A normal search after a warrant by the investigating magistrate can only be executed with the full knowledge of the suspect, whereas the State Security can search the offices and private places of a lawyer without his knowledge.

- When searching an office, taps can be placed to tap all conversations (not only phone calls) the lawyer has with clients, opponent parties, etc.
- The State Security can read files, computers, hard disks and even take certain objects (files etc.) and put them back later.

It goes without saying that these competences of the State Security threaten the independence of the lawyer quite severely and it is unacceptable that a criminal file can be initiated on basis of information obtained by searching a lawyer's office.

Since the State Security will report every potential crime to the Public Prosecutor, criminal investigations can be started with confidential information of a client that was stored at the lawyer's office and relates to other clients, other cases which initially weren't the reason for the State Security to search the office.

A lawyer's professional secrecy and client-lawyer confidentiality is therefore at stake, because a client might become very suspicious with transmitting information in relation to his defence to his lawyer when he realizes this information is not safe and can be obtained during a secret search by the State Security and could mean a criminal investigation is started against him.

Since the actual control is rather limited and the State Security has a broad competence to assess itself whether the measures are proportional, we deem it is necessary for the legislative bodies to act and increase the procedural safeguards in relation to investigative measures by the State Security. However, it might take some time before the legislator will act, since we still do not have a government and creating a government is the main priority for the time being and more important than granting more protection to those annoying lawyers.

So, dear colleagues, I have reached the end of my presentation. If you became frightened after hearing my exposé in relation to the Belgian State Security, you are absolutely right and you should be. If you ever dare to come to Belgium, we strongly recommend you to contact a lawyer. We are of course at your disposal for any legal assistance but we won't feel offended if you would decide to contact another firm.