THE PROTECTION OF JOURNALISTIC SOURCES UNDER FIRE?

HOW DEVELOPMENTS IN EUROPEAN HUMAN RIGHTS LAW HAVE REINFORCED THE RIGHT OF JOURNALISTS TO HAVE THEIR SOURCES PROTECTED.

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"The duty to give evidence is a normal civic duty in a democratic society. (..) That duty will suffice to justify an interference created by an obligation to testify on the ground that it is necessary for the maintenance of the authority and impartiality of the judiciary. (..) The Commission recalls that in a criminal trial, it is for the judge to consider the evidences before the court, and to assess its relevance and admissibility. The judge can only perform this function if he has powers to require the production of evidence before the court in the first place (..). The full picture should be before the criminal court"

(European Commission of Human Rights 18 January 1996, BBC v. the United Kingdom, Appl. 25798/94, Decisions & Reports, *1994 - 84 A, 129)*

"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, such a measure cannot be compatible with Article 10 of the Convention, unless it is justifiable by an overriding requirement in the public interest"

(European Court of Human Rights 27 March 1996, Goodwin v. the United Kingdom, § 39).

1. The protection of journalistic sources and the freedom of expression and information

One of the most fundamental rules of journalistic ethics, recognised in national and international codes, is that a journalist shall protect confidential sources of information. The obligation of journalists to maintain the confidentiality of their sources may come into conflict with the request of a litigant, a prosecutor, a judge, a court or any other investigative authority to ascertain the identity of a source for the purposes of proof, taking further action against the source or conducting further information. As a witness, journalists can be required to answer all relevant questions put to them and to provide the relevant documents in order to facilitate the due administration of justice. Consequently, the administration of justice is denied by a journalist refusing to identify a source and refusing to help to bring all the relevant information before the court.

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Within the journalistic profession however it is considered as a "sacrosanct" obligation not to reveal the identity of a (confidential) source, even if the journalist risks to be prosecuted or convicted because of a refusal of a disclosure order.

The reasons behind this principle are obvious.

Journalists often receive leaked documents or information from sources who wish to remain anonymous, for instance because the information was intended to remain secret or confidential within a certain (private or public) organisation. Leaked information is an important source of journalistic input and it is only when journalists can guarantee the confidentiality and the anonymity of their sources that this crucial aspect of the news flow is protected. The idea is that journalists' sources are to be protected, otherwise sources of information may dry up. Journalists cultivate sources by promising them confidentiality.

As G. Robertson and A. Nicol point out in their handbook on media law:

"*The cultivation of sources is thus professionally essential for journalists. It is a basic tool of their trade, the means by which newsworthy information is extracted, other than from those paid to give it a particular spin. Were it not for "unofficial sources" obligingly talking "off the record" to journalists, there would simply be much less news in the newspapers. There would be fewer facts and less information for discussion, for dispute and sometimes for retraction, in democratic society (..). If sources, frightened of exposure and reprisal, decide not to talk, there will not only be less news, but the news which is published, will be less reliable. It will not be checked for spin*"[2].

As the input of information coming from persons who want to remain anonymous, as e.g. whistleblowers, is extremely important for investigative journalists, and as this kind of journalism due to economic and commercial developments in the media sector by itself already has problems to develop, or even to survive, at least the legal protection of journalistic sources should be guaranteed. An ultimate goal and important perspective of the freedom of expression is the right of the public to be properly informed on matters of public interest. From this perspective proactive and investigative journalism is a crucial approach in order not to report only official sources or to rely solely on data and information the journalist has (passively) received on the news desk.

The crucial reason for not compelling journalists to reveal their sources of information or not compelling them to produce documents, files, pictures or film on demand of the police or the judiciary is that it would be a very negative evolution if the people in general, and (potential) sources specifically, would have the impression that the press and journalists can be easily incorporated in the work of police and the judiciary. It is important in other words to avoid, to prevent that the impression would grow that the press is a kind of an extension piece or an instrument of the institutionalised powers in society. The press and journalists should not be considered as virtual collaborators, neither as tools for police investigation, judicial prosecution or other law enforcement bodies.

This reasoning is not only developed by the journalistic sector itself, in ethical codes of journalistic practice, in media sociology or in journalism studies.

Within the Council of Europe the importance of the protection of journalistic sources is emphasized in the light of Article 10 of the European Convention on Human Rights. **Resolution No. 2 of the Prague**

[2]G. ROBERTSON and A. NICOL, *Robertson & Nicol on media law,* London, Sweet & Maxwell, 4th Edition, 2002, 254-255. See also D. VOORHOOF, "Guaranteeing the freedom and independence of the media", in X. *Media and democracy*, Strasbourg, Council of Europe Publishing, 1998, 49 and D. VOORHOOF, "Vrijheid van meningsuiting", in J. VANDELANOTTE en Y. HAECK (eds.), *Handboek EVRM*, Antwerpen-Oxford, Intersentia, 2004, 837-1061. See also http://europe.ifj.org/en/pages/protection-of-sources and www.statewatch.org/news/2005/dec/ifj-sources-handbook.pdf.

Ministerial Conference on Mass Media Policy (1994) refers to the protection of journalistic sources as a prerequisite for the freedom of expression and information in order to "*enable journalism to contribute to the maintenance and development of genuine democracy*"[3].

The protection of journalistic sources on the basis of Article 10 of the European Convention on Human Rights is recognised by the European Court of Human Rights in the case of **Goodwin versus the United Kingdom** (27 March 1996), a landmark judgment for the protection of journalistic sources:

"Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected".

The Court also decided:

"*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, such a measure cannot be compatible with Article 10 of the Convention, unless it is justifiable by an overriding requirement in the public interest".*

2. The protection of journalists' sources, the European Convention (Art. 10) and the case law of the European Court of Human Rights

The quotation of the European Court's judgment in *Goodwin v. the United Kingdom* makes clear that the protection of journalistic sources is not absolute. As this right is rooted in Article 10 of the European Convention, there might be reasons, responsibilities, duties that can restrict in one way or another the right of a journalist to keep his sources protected. An interference in the journalist's right to freedom of expression and information is not to be considered as a breach of Article 10 of the Convention if such interference is prescribed by law and is necessary in a democratic society for the legitimate aim pursued, such as the protection of the rights of other, the authority or the impartiality of the judiciary or the prevention of disorder or crime. Article 10 § 2 of the Convention shapes the framework for the balancing of the freedom of expression as a fundamental human right in a democracy with *other* human rights and freedoms[4].

The European Court indeed has explicitly decided that an order of source disclosure is possible in certain circumstances, that is if interests are involved that are more imperative and more important than freedom of expression. According to the European Court it is however only when it is "*justifiable by an overriding requirement in the public interest*" that a disclosure order can be assumed to be in accordance with Article 10 § 2 of the Convention. It is also underlined by the Court that limitations on the confidentiality of journalistic sources "*call for the most careful scrutiny by the Court*".

Goodwin v. the United Kingdom (violation Article 10)

In the Goodwin case the European Court came to the conclusion that the order compelling the journalist William Goodwin to reveal his sources was a breach of Article 10 of the Convention. The case concerned a young journalist in 1989 working for an economic magazine *The Engineer*. Goodwin was given information by a source about a commercial company, Tetra. This information was derived from an internal and strictly confidential corporate plan. The document indicated that the company was experi-

[3]Resolution No. 2 "*Journalistic Freedoms and Human Rights*", 4th European Ministerial Conference on Mass Media Policy, *The Media in a Democratic Society*, Prague, 7-8 December 1994, DH-MM (2000) 4, 39-42.

[4]The title of the COE-conference where this paper was presented (see footnote 1) would have been more correctly if it had been formulated as: "The media in a democratic society. Reconciling freedom of expression with the protection of *other* human rights".

encing financial difficulties. After Goodwin contacted the company in order to check the facts and seek its comments on the information, the company started a procedure in order to find out who of its employees leaked the sensitive and confidential information. Goodwin was ordered by the judge to disclose his notes on the grounds that it was necessary in the interests of justice within the meaning of Section 10 of the Contempt of Court Act of 1981, for the source's identity to be disclosed in order to enable Tetra to bring proceedings against the source and to recover the document, obtain an injunction preventing further publication or seek damages for the expenses to which it had been put. The Court of Appeal finally gave order to Goodwin either to disclose his notes to Tetra or to deliver them to the Court in a sealed envelope with accompanying affidavit. This order was upheld by the House of Lords in 1990. Goodwin however did not comply with this order, which led to a judgment of the High Court who fined the applicant £ 5.000 for contempt of court[5].

In its judgment of 27 March 1996 the European Court concluded that both the order requiring Goodwin to reveal his source and the fine imposed on him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10 of the Convention. In the Court's view there was no reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve them. The restriction which the disclosure order entailed on Goodwin could not be regarded as having been necessary in a democratic society.

De Haes en Gijsels v. Belgium (violation Article 10)

The protection of journalistic sources may also be applicable in cases where the journalist is not a witness, but a person accused or held liable for defamatory statements. Such cases can be considered from the scope of Article 6 of the Convention (*right to a fair trial*). In its judgment in the case of *De Haes and Gijsels v. Belgium* the European Court of Human Rights applied the right of journalists not to disclose their source to a specific defamation case. An editor and a journalist had been convicted of defamation by the Brussels' civil Court of first instance, a judgment which was confirmed later by the Court of Appeal and the Supreme Court (Court of Cassation). De Haes and Gijsels were held liable for defamation in criticising some members of the judiciary. According to the Belgian courts, during the procedure the journalist and the editor did not sufficiently proof the truth of their allegations, as they had refused to prove the truth of the defaming information by disclosing their source. Their allegations however had been based on statements by court experts in other prior cases. For that reason De Haes and Gijsels had invited the Court of first instance and the Court of Appeal to order that these documents, already in the possession of other Belgian courts, would be submitted as evidence before the courts dealing with the defamation case in which the journalist and the editor were the defendants. The Belgian courts however were of the opinion that the request for production of documents demonstrated the lack of care with which De Haes and Gijsels had written their articles.

In its judgment of 24 February 1997 the European Court of Human Rights held that under Article 6 of the European Convention on Human Rights, national courts may not reject an application from an accused journalist to consider alternative evidence beside the disclosure of the source of information by this journalist, if such alternative evidence for the proof of the journalist's statements is available to the judiciary. The Court was of the opinion that the journalist's and the editor's concern not to risk compromising their sources of information by lodging the documents in question themselves, was legitimate. The outright rejection by the Belgian courts to study at least the opinion of the three experts whose reports had prompted De Haes and Gijsels to write their articles was considered as a breach of Article 6 of the Convention, as this rejection was to be regarded as a substantial disadvantage *vis-à-vis* the plaintiffs in the defamation case. There was therefore a breach of the principle of equality of arms. And hence a violation of Article 6 of the Convention, with reference to the protection of journalistic

[5]ECtHR 27 March 1996, Goodwin v. the United Kingdom.

sources as protected by Article 10 of the Convention[6].

In other judgments the Court has reiterated that journalist have an obligation to rely on a sufficient solid, factual basis for the publication of critical remarks or defamatory allegations but that such an obligation does not imply that they have to reveal the identity of the persons who have provided them the information they have relied on[7].

Fressoz and Roire v. France (violation Article 10)

In the judgment in the case *Fressoz and Roire v. France* the Court was of the opinion that "journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection", *in casu* in the light of the question if journalists were allowed to use, publish or refer to leaked, confidential documents falling under the protection of professional secrecy of others. The case concerned the conviction of Fressoz and Roire, the publishing director and a journalist of *Le Canard Enchaîné,* because of the publication of confidential tax files of the chief executive officer of Peugeot. According to the Court journalists however can invoke the protection of Article 10 of the Convention, as it falls to be decided whether "in particular circumstances of the case, the interest in the public's being informed outweighed the "duties and responsibilities" the applicants had as a result of the suspect origin of the documents that were sent to them". In the judgment of 21 January 1999 the Court reached the conclusion that the conviction of Fressoz and Roire because of the publication of confidential tax files violated Article 10 of the Convention[8]. The judgment gives additional protection to journalists using information or documents from confidential sources who themselves have breached a duty of confidentiality.

Roemen and Schmit v. Luxembourg (violation Article 10)

In the case of *Roemen and Schmit v. Luxembourg* the European Court of Human Rights again recognised the importance of the protection of journalistic sources. At the origin of this case lies an article in the *Lëtzëbuerger Journal* in which Robert Roemen reported that a Minister was convicted of tax evasion, commenting that such conduct was all the more shameful coming from a public person who should set an example. The article reported that the Minister had been ordered to pay a tax fine of LUF 100.000 (nearly EUR 2.500). This information was based on an internal document that was leaked from the Land Registry and Land Property Office. The Minister lodged a criminal complaint and an investigation was opened in order to identify the civil servant(s) who had handled the file under a breach of professional confidence. On instructions of the investigative judge searches were carried out at the journalist's home and place of work and at his lawyer's office. Both lodged several applications to set aside the investigating judge's instructions and the investigative measure undertaken on the strength of them, particularly the searches. All of these applications were dismissed by the Luxembourg domestic courts. Roemen and Schmit applied before the European Court in Strasbourg, alleging a breach of Article 6, 8 and 10 of the Convention. In its judgment of 25 February 2003 the Court came to the conclusion that the searching of the journalist's home and office was to be considered as a violation of Article 10 of the Convention[9]. Confirming its case law the Court considered that "having regard to the importance of the protection of

[6]ECtHR 24 February 1997, De Haes and Gijsels v. Belgium.

[7]ECtHR (Grand Chamber) 17 December, Cumpănă and Mazăre,v. Romania (§ 106) and ECtHR 31 January 2006, Stângu and Scutelnicu v. Romania (§ 52).

[8]ECtHR 21 January 1999, Fressoz and Roire v. France. See also ECtHR 19 December 2006, Radio Twist v. Slovakia and ECtHR 6 June 2007, Dupuis v. France.

[9]ECtHR 25 February 2003, Robert Roemen and Anne-Marie Schmit v. Luxembourg.

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, such a measure cannot be compatible with Article 10 of the Convention, unless it is justifiable by an overriding requirement in the public interest". The Court recognised that the searches carried out in the journalist's home and place of work were prescribed by law and pursued the legitimate aim of maintaining the public order and preventing crime. However, because the article had discussed a matter of general interest, the search interferences could not be compatible with Article 10 of the Convention unless they were justified by an "overriding requirement in the public interest". The Court was of the opinion that the Luxembourg authorities had not shown that the balance between the interests at stake had been preserved. The Court underlined that the search warrant gave the investigate officers very wide powers to burst in on a journalist at his place of work and gave them access to all the documents in his possession. The reasons adduced by the Luxembourg authorities could not be regarded as sufficient to justify the searches of the journalist's home and place of work. Therefore the Court comes to the conclusion that the investigative measures in issue had been disproportionate and had infringed Roemen's right to freedom of expression. The judgment also confirms the Court's case law that in principle the secrecy of communication between a lawyer and his or her client falls under the protection of privacy as guaranteed by Article 8 of the Convention. The Court considered that the search carried out by the Luxembourg judicial authorities at the lawyer's office and the seizure of a document had amounted to an unacceptable interference with her right to respect for her private life, and hence amounted to a violation of Article 8 of the Convention. The Court emphasized that the search carried out at the lawyer's office clearly amounted to a breach of the journalist's source through the intermediary of his lawyer. The Court held that the search had therefore been disproportionate to the legitimate aims pursued, particularly in view of the rapidity with which the search order had been carried out.

It is to be underlined that the Court clearly expressed the opinion that the searches carried out in the journalist's home and place of work and at his lawyer's office are even a greater treath to freedom of expression of journalists than a (court) order to reveal their sources. According to the Court a search is "un acte plus grave", as it gives access to all documents which a journalist has in his possession: "La Cour juge que des perquisitions ayant pour but de découvrir la source du journaliste - même si elles restent sans résultat - constituent un acte plus grave qu'une sommation de divulgation de l'identité de la source". The Court emphasises that the searches at Roemen's home and place of work "avaient un effet encore plus conséquent sur la protection des sources que dans l'affaire Goodwin".

Ernst and others v. Belgium (violation Article 10)

Also in the case of *Ernst and others v. Belgium* the Court found a violation of the rights of journalists to have their sources protected[10]. In 1995, searches took place in offices of Belgian media on the instructions of the investigative judge in charge of the case on the murder of André Cools, Minister of State and former head of the Socialist Party who was killed in Liège in 1991. The searches were carried out at the news desks of some newspapers (*Le Soir, Le Soir Illustré* and *De Morgen*), in the head office of the *RTBF*, the public broadcasting company of the French Community. Searches were also carried out in the homes of five journalists. Files, diskettes and hard disks of computers belonging to the journalists were taken for investigation. The background to these measures was that leaks in this and other very sensitive criminal cases had prompted proceedings against members of the judiciary on a charge of breach of professional confidence.

Some of the newspapers, four journalists, the society of professional journalists of *Le Soir* and the Belgian association of professional journalists (AGJPB/AVBB) applied before the European Court, alleging a

[10]ECtHR 15 July 2003, Ernst and others v. Belgium

violation of Article 6, 8, 10, 13[11] and 14[12] of the Convention. Relying on Article 10 of the Convention they asserted that the searches and the seizures carried out on their premises constituted an interference with the exercise of their freedom of expression. The applicants argued that "*les perquisitions massives et les saisies constitueraient une ingérence inqualifiable des autorités belges dans l'exercice de la liberté d'expression. Cette ingérence ne saurait être considéré comme une restriction prévue par la loi, poursuivant un but légitime et nécessaire dans une société démocratique",* and that *"les perquisitions et saisies qui ont eu lieu à leur domicile et dans certains rédactions sont constitutives d'une violation du secret des sources du journaliste*".

In a decision of 25 June 2002 the Strasbourg Court declared the application of the news media and the journalists admissible. The Court was of the opinion that the case raised important questions of fact and law, which cannot be resolved at the stage of the admissibility but require an examination on the merits[13]. The application by *Le Soir Professional Journalists Society* and *the General Association of Professional Journalists in Belgium* however was dismissed as both organisations were not be considered as a "victim" in the sense of Article 34 of the Convention.

The European Court in its judgment of 15 July 2003 has come to the conclusion that the searches and seizures were neglecting the protection of journalistic sources protected by the right of freedom of expression and the right of privacy. The Court agreed that the interferences by the Belgian judicial authorities were prescribed by law and intended to prevent the disclosure of information received in confidence and to maintain the authority and impartiality of the judiciary. The Court considered that the searches and seizures which were intended to assemble information that could lead to the identification of police officers or members of the judiciary leaking confidential information came within the sphere of protection of journalistic sources, an issue which called for the most careful scrutiny by the Court. The Court emphasised the large scale of the searches that had been performed, while at no stage it had been alleged that the applicants had written articles containing secret information about the cases. The Court questioned also whether other means could not have been employed to identify those responsible for the breaches of confidence and especially took in consideration that the police officers involved in the operation of the searches had very wide investigative powers. The Court found that the Belgian authorities had not shown that the searches and seizures on such a large scale had been reasonably proportionate to the legitimate aims pursued and therefore came to the conclusion that there has been a violation of Article 10 of the Convention. The Court, for analogue reasons, also found a violation of the right of privacy protected under Article 8 of the Convention.

Nordisk Film & TV A/S v. Denmark (no violation of Article 10)

In August 2002, by judgment of the Danish Supreme Court (*Højesteret*) Nordisk Film & TV, was compelled to hand over limited specified unedited footage and notes of a broadcasted television programme investigating paedophilia in Denmark. For making the programme, a journalist went undercover. He participated in meetings of "The Paedophile Association" and interviewed with hidden camera two members of the association who made incriminating statements regarding the realities of paedophilia in both Denmark and India, including advice on how to induce a child to chat over the internet and how easy it was to procure children in India. In the documentary broadcasted on national television

[11]Right to an effective remedy.

[12]Prohibition of discrimination.

[13]ECtHR 25 June 2002, Martine Ernst and others v. Belgium, Appl. No. 33400/96, *www.echr.coe.int.* See also M. Simonis, "Perquisitions: L'AGJBP à Strasbourg", *Journalistes,* 2002/28, 1-3 and -, "Strasbourg. L'action des journalistes est recevable", *Journalistes* 2002/29, 1-3.

false names were used and all persons' faces and voices were blurred. The day after the broadcast of the programme one of the interviewed persons, called "Mogens", was arrested and charged with sexual offences. For further investigation the Copenhagen Police requested that the un-shown portions of the recordings made by the journalist be disclosed. The journalist and the editor of the applicant company's documentary unit refused the request. Also the Copenhagen City Court and the High Court refused to grant the requested court order having regard to the need of the media to be able to protect their sources. The Supreme Court however found against the applicant company, so that the latter was compelled to hand over some parts of the unedited footage which solely related to "Mogens". The court order explicitly exempted the recordings and notes that would entail a risk of revealing the identity of some persons (a victim, a police officer and the mother of a hotel manager), who were interviewed while they were promised by the journalist that they could participate without the possibility of being identified. In November 2002 Nordisk Film & TV complained in Strasbourg that the Supreme Court's judgment breached its rights under Article 10 of the Convention, referring to the European Court's case law affording a high level of protection of journalistic sources.

In its decision of 8 December 2005 the Strasbourg Court has come to the conclusion that the judgment of the Danish Supreme Court did not violate Article 10 of the Convention. The Strasbourg Court is of the opinion that the applicant company was not ordered to disclose its journalistic sources of information, but that it was rather ordered to hand over part of its own-research material. The Court is not convinced that the degree of protection applied in this case can reach the same level as that afforded to journalists when it becomes to their right to keep their sources confidential under Article 10 of the Convention. The Court is also of the opinion that it is the state's duty to take measures designed to ensure that individuals within their jurisdiction are not subjected to inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment or sexual abuse of children of which the authorities had or ought to have knowledge. The European Court supports the opinion of the Danish Supreme Court that the non-edited recordings and the notes made by the journalist could assist the investigation and production of evidence in the case against "Mogens" and that it concerned the investigation of alleged serious criminal offences. Of particular importance is that the Supreme Court's judgment explicitly guaranteed that material which entailed the risk of revealing the identity of the journalist's sources was exempted from the court order and that the order only concerned the handover of a limited part of the unedited footage as opposed to more drastic measures such as for example a search of the journalist's home and workplace. In these circumstances the Strasbourg Court is satisfied that the order was not disproportionate to the legitimate aim pursued and that the reasons given by the Danish Supreme Court in justification of those measures were relevant and sufficient. Hence Article 10 of the Convention has not been violated. The application is manifestly ill-founded and is declared inadmissible.

The decision of the European Court makes clear that the Danish Supreme Court's order to compel the applicant to hand over the unedited footage is to be considered as an interference in the applicant's freedom of expression within the meaning of Article 10 § 1 of the Convention. *In casu* the interference however meets all the conditions of Article 10 § 2, including the justification as being "necessary in a democratic society". The Strasbourg Court is also of the opinion that the Supreme Court and the Danish legislation (Art. 172 and 804-805 of the Administration of Justice Act) clearly acknowledge that an interference with the protection of journalistic sources cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest, hence reflecting the approach developed in the Strasbourg Court's jurisprudence in the case of *Goodwin v. the United Kingdom* (1996), *Roemen and Schmit v. Luxembourg* (2003) and *Ernst and others v. Belgium* (2003)[14].

[14]Decision as to the admissibility by the European Court of Human Rights (First Section), case of Nordisk Film & TV A/S v. Denmark, Application no. 40485/02 of 8 December 2005, available at http://www.echr.coe.int (Hudoc), see also D. VOORHOOF, "Rechter kan niet-uitgezonden televisiebeelden van interview met pedofiel opeisen", *Mediaforum* 2006/3,

Voskuil v. the Netherlands (violation of Article 10)

This case concerns the complaint of a journalist, Mr. Voskuil, having been denied the right not to disclose the source he had relied on for writing two articles in the newspaper *Sp!ts*. As he had refused to reveal his source to the authorities, Voskuil was detained for more than two weeks, in an attempt to compel him to reveal the identity of his source.

In essence the Court was struck by the lengths to which the Netherlands authorities had been prepared to go to learn the source's identity. Such far-reaching measures could but discourage those who had true and accurate information relating to wrongdoing from coming forward in the future and sharing their knowledge with the press. The Court found that the Government's interest in knowing the identity of the journalist's source had not been sufficient to override the journalist's interest in concealing it. There had therefore been a violation of Article 10[15].

Tillack v. Belgium (violation of Article 10)

In another case the journalist H.M. Tillack applied for a violation by the Belgian authorities of this right of protection of sources. Tillack has been suspected of having bribed a civil servant by paying him EUR 8,000 in exchange for confidential information concerning investigations in progress in the European institutions. Tillack's home and workplace were searched and almost all his working papers and tools were seized and placed under seal (16 crates of papers, two boxes of files, two computers, four mobile phones and a metal cabinet). The European Court emphasized that a journalist's right not to reveal her or his sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information, to be treated with the utmost caution, even more so in the applicant's case, where he had been under suspicion because of vague, uncorroborated rumours, as subsequently confirmed by the fact that he had not been charged. The Court also took into account the amount of property seized and considered that although the reasons given by the Belgian courts were "relevant", they could not be considered "sufficient" to justify the impugned searches. The European Court accordingly found that there had been a violation of Article 10 of the Convention[16].

Financial Times Ltd. and others v. the United Kingdom (violation of Article 10)

In 2002 British courts decided in favour of a disclosure order in the case of *Interbrew SA* v. *Financial Times* and others. The case concerns the order against four newspapers (FT, The Times, The Guardian and The Independent) and the news agency Reuters to deliver up their original copies of a leaked and (apparently) partially forged document about a contemplated takeover by Interbrew (now: Anheuser Busch InBev NV) of SAB (South African Breweries). In a judgment of 15 December 2009 the European Court of Human Rights (Fourth Section) has come to the conclusion that this disclosure order was a violation of the right of freedom of expression and information, which includes press freedom and the right of protection of journalistic sources as protected by Article 10 of the European Convention of Human Rights.

65-67. See also European Commission of Human Rights 18 January 1996, *BBC v. the United Kingdom*, Appl. 25798/94, *Decisions & Reports*, 1994-84, 129. Also in the case *of Šečič v. Croatia* (31 May 2007), the Court took into consideration that in some circumstances an action of the police or the Public Prosecutor's Office in requesting a competent court to order a journalist to reveal his source of information would not a priori be incompatible with Article 10 of the Convention. The case concerned an investigation related to ill-treatment of Roma in the meaning of Article 3 of the Convention.

[15]ECtHR 22 November 2007, Voskuil v. the Netherlands.

[16]ECtHR 27 November 2007, Tillack v. Belgium.

The European Court of Human Rights has come to the conclusion that the British judicial authorities in the Interbrew case have neglected the interests related to the protection of journalistic sources, by overemphasizing the interests and arguments in favour of source disclosure. The Court accepts that the disclosure order in the Interbrew case was prescribed by law (*Norwich Pharmacal* and Section 10 of the *Contempt of Court Act* 1981) and was intended to protect the rights of others and to prevent the disclosure of information received in confidence, both of which are legitimate aims. The Court however does not consider the disclosure order necessary in a democratic society. Disclosure orders of journalistic sources have a detrimental impact not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves. The Courts accepts that it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information. The Court makes clear however that domestic courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. The Court emphasizes most importantly that "*the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2*" (§ 63).

The European Court of Human Rights comes to the conclusion that the British Courts have given too much weight to the alleged bogus character of the leaked document and to the assumption that the source had acted *mala fide*. While the Court considers that there may be circumstances in which the source's harmful purpose would in itself constitute a relevant and sufficient reason to make a disclosure order, the legal proceedings against the four newspapers and Reuters did not allow X's purpose to be ascertained with the necessary degree of certainty. The Court therefore does not place significant weight on X's alleged purpose in the present case, but does clearly emphasize the public interest in the protection of journalistic sources. The Court accordingly, finds that Interbrew's interests in eliminating, by proceedings against X, the threat of damage through future dissemination of confidential information and in obtaining damages for past breaches of confidence were, even if considered cumulatively, insufficient to outweigh the public interest in the protection of journalists' sources. The judicial order to deliver up the report at issue is considered a violation of Article 10 of the Convention[17].

Sanoma Uitgevers BV v. the Netherlands (violation of Article 10)

On 31 March 2009 the Chamber of the Third Section of the European Court of Human Rights (ECtHR) delivered a highly controversial judgment in the case of *Sanoma Uitgevers B.V. v. the Netherlands.* With a 4/3 decision the Court was of the opinion that the order to hand over a CD-ROM with photographs in the possession of the editor-in-chief of a weekly magazine claiming protection of journalistic sources, did not amount to a violation of Article 10 of the European Convention of Human Rights. The finding and motivation of the majority of the Chamber was not only strongly disapproved in the world of media and journalism, but was also firmly criticised by the dissenting judges. *Sanoma Uitgevers B.V.* requested for a referral to the Grand Chamber, this request being supported by a large number of media, NGOs advocating media freedom and professional organisations of journalists. On 14 September 2009 the panel of five Judges decided to refer the case to the Grand Chamber in application of Article 43 of the Convention. By referring the case to the Grand Chamber the panel accepted that the case raised a seri-

[17] ECtHR 15 December 2009, Financial Times Ltd. and others v. the United Kingdom. The Court has also recognized the right of whistle blowers, under certain circumstances, to be guaranteed by Article 10 of the Convention: ECtHR (Grand Chamber) 12 February 2008, Guja v. Moldova, ECtHR 26 February 2009, Kudeshkina v. Russia and ECtHR 21 July 2011, Heinisch v. Germany.

ous question affecting the interpretation or application of Article 10 of the Convention and/or concerned a serious issue of general importance.

On 14 September 2010, the 17 judges of the Grand Chamber unanimously reached the conclusion that the order to hand over the CD-ROM to the public prosecutor was a violation of the journalists' rights to protect their sources. It noted that orders to disclose sources potentially had a detrimental impact, not only on the source, whose identity might be revealed, but also on the newspaper or publication against which the order was directed, whose reputation might be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who had an interest in receiving information imparted through anonymous sources. Protection of journalists' sources is indeed to be considered "a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected". In essence the Grand Chamber is of the opinion that the right to protect journalistic sources should be safeguarded by sufficient procedural guarantees, including the guarantee of prior review by a judge or an independent and impartial decision-making body, before the police or the public prosecutor have access to information capable of revealing such sources. Although the public prosecutor, like any public official, is bound by requirements of basic integrity, in terms of procedure he or she is a "party" defending interests potentially incompatible with journalistic source protection and can hardly be seen as objective and impartial so as to make the necessary assessment of the various competing interests. As in the case of *Sanoma Uitgevers B.V. v. the Netherlands* an *ex ante* guarantee of a review by a judge or independent and impartial body was not existing, the Grand Chamber is of the opinion that "the quality of the law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources". Emphasizing the importance of the protection of journalistic sources for press freedom in a democratic society the Grand Chamber of the European Court finds a violation of Article 10 of the Convention. The judgment implies that member states of the Convention shall build in procedural safeguards in their national law in terms of a judicial review or other impartial assessment by an independent body based on clear criteria of subsidiarity and proportionality and prior to any disclosure of information capable of revealing the identity or the origin of journalists' sources[18].

Martin and others v. France (violation of Article 10)

In *Martin a.o. v. France* the ECtHR again found a violation of Article 10 in a case related to the protection of journalists' sources. The concerns a search of the premises of the *Midi Libre* daily newspaper ordered by an investigating judge and the investigation against journalists of the newspaper in order to determine in what circumstances and conditions they had obtained a copy of a confidential draft report of the Regional Audit Office concerning the management of the Languedoc-Roussillon region. The *Midi Libre* published several articles quoting passages from the report, even though it was legally confidential. The report was obviously leaked to the journalists of *Midi Libre.* A complaint was lodged against the journalists Francois Martin, Jacky Vilaceque and Anthony Jones, together with an application to initiate proceedings for breach of professional secrecy and handling of information thus disclosed. In order to determine in what circumstances the journalists had obtained the confidential information, the investigating judge, assisted by a computer expert, decided to order a search of the newspaper's premises. Various documents were seized and placed under seal, including a copy of the Audit Office report. The judge also had copies made of the computer hard drives of the journalists concerned. Analysis of the

[18] ECtHR (Grand Chamber) 14 September 2010, Sanoma Uitgevers BV v. the Netherlands. See also http://strasbourgobservers.com/2010/09/16/extra-procedural-safeguards-for-protection-of-journalistic-sources-sanoma-uitgevers-b-v-v-the-netherlands/

hard drives revealed traces of the Audit office report on two journalists' computers. The investigation however failed to reveal who had given or sent the confidential report to the journalists. Following the investigation, the judge placed four journalists of *Midi Libre* under investigation for handling information disclosed in breach of professional secrecy. When questioned by the judge, they all exercised their right as journalists to protect their sources.

The journalists requested that the search and all the subsequent proceedings be set aside, arguing that they were in violation of the freedom of expression protected by Article 10 of the Convention. In a judgment of the investigation chamber of the Montpellier Court of Appeal rejected their request, pointing out that the search had been carried out to determine how the journalists had managed to obtain information from a confidential report. It added that the principle of the protection of journalistic sources should not obstruct the search for the truth in criminal matters, which could legitimately be pursued by searching press offices and seizing evidence. The journalists lodged an appeal on points of law, arguing that in failing to verify whether the search had pursued a legitimate aim and had been necessary, in a democratic society, to achieve that aim, the Court of Appeal had violated Article 10 of the Convention. The Court of Cassation rejected the appeal, considering that the search had been conducted in conformity with criminal procedure and that the interference had been necessary and proportionate to the legitimate aim pursued, namely the protection of the rights of others – in this case the presumption of innocence –, the protection of confidential information and the need to prevent behaviour that obstructed the search for the truth.

In the interim, however, the investigating judge had discharged the journalists, noting that it had not been possible to establish that the person who had leaked the information was bound by a duty of professional secrecy, and that as no prior offence had been established, the charge of handling information disclosed as a result of a breach of that duty could not stand. In a judgment of the Montpellier Court of Appeal it was confirmed that as no breach of professional secrecy had been established, there could be no offence of handling information disclosed as a result of such a breach.

The four journalists complained in Strasbourg that the investigation to which they had been subjected had violated the provisions of Article 10 of the Convention. The European Court reiterated that it had already found that searches conducted in journalists' homes or places of work with a view to identifying the sources of breaches of professional secrecy infringed the rights protected by Article 10 of the Convention. In this case there had been interference with the journalists' freedom to receive or communicate information. In the Court's view, that interference had been prescribed by law and its aim had been to prevent the publication of confidential information and to protect the rights of others, in particular the presumption of innocence. The crux of the matter was whether the interference was "necessary in a democratic society", answered a pressing social need and was proportionate to the legitimate aim pursued, and whether the reasons given by the authorities to justify it were relevant and sufficient.

The Court noted that the applicants were journalists who had published articles in a daily newspaper containing extracts from a draft report by the Languedoc-Roussillon Regional Audit Office criticising the management of the region when J.B. was president of the council. The offending articles mainly contained information concerning the management of public funds by elected officials, which was criticised in the report. The Court had no doubt that this was a topic of general interest that the journalists were entitled to bring to the attention of the public. The role of investigative journalists was precisely to inform and alert the public, particularly of bad news, as soon as the information came into their possession. The journalists had mentioned on the first page of the newspaper that the information came from "a draft report that might be amended in the light of the response of the people it criticised". The Court considered that the journalists had made a clear presentation of the report in question that displayed their good faith and respect for the ethics of their profession.

The Court noted also that the report in question had been communicated to the former president of the Languedoc-Roussillon regional council and that extracts had been sent to the seventy people criticised in the report. The judge who had placed the journalists under investigation had stated in his order that the investigation had failed to establish whether the person at the origin of the leak had been bound by a duty of professional secrecy. The investigation chamber of the Montpellier Court of Appeal had noted that the people to whom the report had been sent were not bound by a duty of professional secrecy, and that according to the Financial Judicature Code, documents in draft form were not automatically classified. The Court wondered whether measures other than searching the newspaper's offices might have enabled the investigating judge to determine whether there had been a breach of professional secrecy. The Government had failed to demonstrate that without the search the authorities would have been unable to seek evidence, first, that there had been a breach of professional secrecy and then that information thus wrongfully obtained had been published. The Court therefore concluded that the French Government had not demonstrated that the competing interests – namely the protection of journalists' sources and the prevention and repression of crime – had been properly balanced. The reasons given by the authorities to justify the search could be considered relevant, but not sufficient. The search had accordingly been disproportionate and had violated the journalists' right to freedom of expression and information under Article 10 of the Convention[19].

Ressiot and others v. France (violation of Article 10)

In this judgment the European Court has re-emphasized the importance to protect journalists' sources, this time in a case of searches and seizures carried out at the French sporting daily *L'Equipe,* the weekly magazine *Le Point* and at the homes of some of their journalists. The Court considered the interferences with the journalists' right to have their sources protected as disproportionate to the interest of democratic society in ensuring and maintaining a free press. This judgment comes only a few months after the European Court's finding of a violation of Article 10 by the French authorities for disrespecting the protection of journalists' sources in the case of *Martin and others v. France*.

The case *Ressiot and Others v. France* concerns the investigations carried out at the premises of *L'Equipe* and *Le Point*, and at the homes of five journalists accused of breaching the confidentiality of a judicial investigation. Both newspapers had published in 2004 a series of articles about an ongoing investigation on alleged doping by the Cofidis cycle racing team in the Tour de France, an investigation carried out by the Drugs Squad. The French authorities wanted to identify the source of the leaks the journalist were obviously relying on to substantiate their reporting about the case. Cofidis in the meantime had lodged an urgent application for an injunction against new articles to be published, alleging that they made insulting assertions and breached the presumption of innocence and the confidentiality of the judicial investigation. Cofidis also lodged a criminal complaint against a person or persons unknown, for breach of confidentiality and use of information thus obtained. In January 2005 the public prosecutor ordered a series of searches in order to uncover traces of the leaked documents.

Short time later the five journalists requested that all the material seized during the searches at the newspapers' offices and their homes, be declared null and void. The investigative measures concerning the newspapers' switchboards and the telephone lines of certain journalists were indeed considered null and void by the French courts. But by contrast, the seizure and placing under seal of certain materials were considered to be legitimate interferences with the protection of journalists' sources. The French courts on the other hand dropped the charges against the journalists of using unlawfully obtained information. All five accused journalists were acquitted.

[19]ECtHR 12 April 2012, Martin and others v. France.

Still, the five journalist lodged an application with the European Court of Human Rights, complaining that the investigations against them had been carried out in violation of Article 10 of the Convention.

In its judgment the Court reiterates the importance of the protection of journalistic sources as one of the cornerstones of freedom of the press. Without such protection, sources might be deterred from assisting the press in informing the public. As a result the vital public-watchdog role of the press might be undermined and the ability of the press to provide accurate and reliable information might be adversely affected. Also referring to the importance of media reporting in informing the public on criminal proceedings and ensuring public scrutiny of the functioning of the criminal justice system. The Court did accept that the interference by the French authorities out of concern for the confidentiality of the investigation had been aimed at preventing the disclosure of confidential information, protecting the reputation of others, ensuring the proper conduct of the investigation and therefore protecting the authority and impartiality of the judiciary, these all being legitimate aims as such to interfere with the right of freedom of expression. While recognizing the vital role played by the press in a democratic society, the Court also stressed that journalists could not, in principle, be released from their duty to obey the ordinary criminal law. The Court noted that when the searches were carried out and the telephone calls tapped, the sole aim had been to identify the source of the information published in the newspaper articles. The Court however pointed out that the right of journalists not to disclose their sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information. The seizure and placing under seal of the lists of the telephone calls of the journalists, the searches carried out at their homes, and the searches and seizures carried out at the offices of *Le Point* and *L'Equipe* had been allowed by the investigation division without any evidence showing the existence of an overriding social need, according to the European Court. The Court concluded that the French Government had not shown that a fair balance had been struck between the various interests involved. Even if the reasons given were relevant, the Court considered that they did not suffice to justify the searches and seizures carried out. The means used were not reasonably proportionate to the legitimate aims pursued having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press. Hence the Court, unanimously, came to the conclusion that there had been a violation of Article 10 of the Convention[20].

3. Recommendation (2000) 7 "on the right of journalists not to disclose their sources of information"

The references just mentioned make clear that in the countries referred to (Luxembourg, Belgium, The Netherlands, the United Kingdom, Denmark, France) the level and the characteristics of the protection of journalistic sources are or were rather uncertain and unclear and are subject to very different approaches by the police, the public prosecutors, investigative judges and the courts. Over the years also in many other countries of the Council of Europe cases have been reported of actions by police or judicial authorities not sufficiently respecting the protection of journalistic sources as guaranteed by Article 10 of the European Convention, in line with the Court's case law since 1996. It is also to be underlined that the Strasbourg Court left open a margin of appreciation by introducing the notion of "*an overriding requirement in the public interest*" that can legitimise a disclosure order.

In order to work out some more practical guidelines and to guarantee an effective protection of journalistic sources in the member states, the Committee of Ministers of the Council of Europe adopted Recommendation (2000) 7 "*on the right of journalists not to disclose their sources of information*" (8 March 2000) [21].

[20] ECtHR 28 June 2012, Ressiot and others v. France.

[21] Committee of Ministers, Recommendation (2000) 7 *on the right of journalists not to disclose their sources of information*, 8 March 2000, DH-MM (2000) 2, 125-128 (Explanatory Memorandum). *Se*e also www.humanrights.coe.int/media/

Principle 1 of the Recommendation stipulates that "*domestic law and practice in member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention (..) and the principles established herein, which are to be considered as minimum standards for the respect of this right*". The right of journalists not to disclose their sources is to be recognised and organised for *"any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of communication*".

Principle 2 of the Recommendation broadens the scope of application of the protection of sources to all persons "*who, by their professional relations with journalist, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information*".

According to the Recommendation the protection of journalistic sources should have a broad field of application: "*Journalists may receive their information from all kinds of sources. Therefore, a wide interpretation of this term is necessary. The actual provision of information to journalists can constitute an action on the side of the source, for example when a source calls or writes to a journalist or sends to him or her recorded information or pictures. Information shall also be regarded as being "provided" when a source remains passive and consents to the journalist taking the information, such as the filming or recording of information with the consent of the source"*.

The notion of "*information identifying a source*" must be broadly interpreted, because it is necessary to protect all kinds of information which are likely to lead to the identification of a source. As far as its disclosure may lead to an identification of a source, the following information is to be protected according to the Recommendation:

i. the name of a source and his or her address, telephone and telefax number, employer's name and other personal data as well as the voice of the source and pictures showing a source;

ii. "the factual circumstances of acquiring this information", for example the time and place of a meeting with a source, the means of correspondence used or the particularities agreed between a source and a journalist;

iii. "the unpublished content of the information provided by a source to a journalist", for example other facts, data, sounds or pictures which may indicate a source's identity and which have not yet been published by the journalist;

iv. personal data of journalists and their employers related to their professional work", i.e. personal data produced by the work of journalists, which could be found, for example, in address lists, lists of telephone calls, registrations of computer-based communications, travel arrangements or bank statements[22].

The nature of the information is not relevant and can include oral or written statements, sounds or pictures.

According to ***principle 3*** of the Recommendation a compelling order to reveal a source is only legitimate when it can be convincingly established that: *i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that: - an overriding requirement of the need for disclosure is proved, - the circumstances are of a sufficiently vital and serious nature, - the necessity of the disclosure is identified as responding to a*

[22]See also the Explanatory Memorandum to Recommendation (2000)7.

pressing social need, and, - member states enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

The first condition refers to the **subsidiarity** principle: the persons or public authorities seeking a disclosure should primarily search for and apply proportionate alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the protection of the right of journalists not to disclose their source. The existence of reasonable alternative measures for the protection of a legitimate interest excludes the necessity of disclosing the source by the journalist and the parties seeking the disclosure have to exhaust these alternatives at first.

The second condition refers to the **proportionality** principle. The public interest in the non-disclosure could, according to the Explanatory Memorandum be outweighed where the disclosure is necessary for "the protection of human life" and "the prevention of major crime". In the latter category are typically activities which may contribute to or result in such crimes as murder, manslaughter, severe bodily injury, crimes against national security, or serious organised crime. The prevention of such crimes can *possibly* justify the disclosure of a journalist's source.

It is also recognised that a disclosure order can be legitimate for "the defence in the course of legal proceedings of a person who is accused or convicted of having committed a serious crime". In the Explanatory Memorandum it is explicitly mentioned that the right of defence of a person, who is accused or convicted of having committed a major crime may *possibly* justify the disclosure of a journalist's source.

The disclosure order must also be "prescribed by law" and it must be pertinently argued in every case why the disclosure order *in casu* is necessary in a democratic society, with a clear motivation why the conditions of subsidiarity and proportionality are fulfilled. Only where and as far as an overriding requirement in the public interest exists and if the circumstances are of a sufficiently vital and serious nature, a disclosure might be considered necessary in a democratic society in accordance with Article 10 § 2 of the European Convention on Human Rights. Principle 3 of the Recommendation stipulates the requirements for the evaluation of such necessity.

Principle 4 of the Recommendation stipulates, in line with the judgment in the case *De Haes and Gijsels v. Belgium*, that in legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist. If in a defamation case alternative evidence for the proof of the journalist's statements is available to the judiciary, respect should be demonstrated towards the protection of journalistic sources.

Principle 5 refers to some procedural conditions which must be fulfilled for initiating any action against a journalist aimed at the disclosure of sources. One of the recommendations is that journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before disclosure is requested (cfr. principle 3). Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the European Convention ("fair trial").

Principle 6 provides that the following measures should not be applied if their purpose is to circumvent the right of journalists not to disclose information identifying a source:

i. interception orders or actions concerning communication or correspondence of journalists or their employers,

ii. surveillance orders or actions concerning journalists, their contacts or their employers, or

iii. search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

The Explanatory Memorandum of Recommendation (2000) 7 considers that "*journalist's private or business premises, belongings or correspondence or personal data related to their work may contain information which could lead to the disclosure of a source. The same situation exists with respect to the business premises, belongings, archives or personal data of the journalist's employer. Any search or seizure action might reveal information identifying a source."* Judicial authorities ordering such search or seizure therefore should limit their search and seizure order with respect to the protection of a journalist's source.

Principle 7 finally refers to the protection against self-incrimination.

It is to be underlined that the circumstance that information was gathered in an illegal way or that the source disclosed the information to the journalist in breach of his or her own obligation of professional confidentiality, may not deprive a journalist of his right of protection of sources.
Action is to be undertaken to make that these basic principles of the Recommendation (2000) 7 are better implemented in the law and the jurisprudence of the Council of Europe Member States. The Committee of Ministers recommended the member states to "*implement in their domestic law and practice the principles appended to this recommendation*" and "*to disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and to bring them in particular to the attention of public authorities, police authorities and the judiciary as well as to make them available to journalists, the media and their professional organisations*".

4. The PACE-Recommendation Rec. 1950 (2011) on the protection of journalists' sources[23].

In a Recommendation of 25 January 2011 the Parliamentary Assembly of the Council of Europe again has insisted that the member states should take appropriate and effective measures in order to protect the right of journalists not to reveal the identity or origin of their sources: "The Assembly notes with concern the large number of cases in which public authorities in Europe have forced, or attempted to force, journalists to disclose their sources, despite the clear standards set by the European Court of Human Rights and the Committee of Ministers. These violations are more frequent in member states without clear legislation. In cases of investigative journalism, the protection of sources is of even greater importance, as stated in the Committee of Ministers' Declaration of 26 September 2007 on the protection and promotion of investigative journalism". The Assembly also refers to the right of every person to disclose confidentially to the media, or by other means, information about unlawful acts and other wrongdoings of public concern, recalling its Resolution 1729 (2010) and Recommendation 1916 (2010) on the protection of "whistle-blowers". It reaffirms that member states should review legislation

[23]http://assembly.coe.int/mainf.asp?Link=/documents/adoptedtext/ta11/erec1950.htm. In contrast with the 2000/7 Recommendation of the Committee of Ministers the Assembly under section 15 of the Recommendation 1950 (2011) suggest to reduce the right of protection of journalists' sources '*ratione personae'.* It is also remarkable, and in contrast with the case of the European Court, that the Recommendation refers to this right as *'a privilege'*. The Assembly indeed considers that "the right of journalists not to disclose their sources of information is a professional privilege, intended to encourage sources to provide journalists with important information which they would not give without a commitment to confidentiality. The same relationship of trust does not exist with regard to non-journalists, such as individuals with their own website or web blog. Therefore, non-journalists cannot benefit from the right of journalists not to reveal their sources".

in this respect to ensure consistency of domestic rules with the European standards enshrined in these texts. It is also emphasized that "Internet service providers and telecommunication companies should not be obliged to disclose information which may lead to the identification of journalists' sources in violation of Article 10 of the Convention". The Assembly furthermore insists on the need to ensure that legal provisions enacted by member states when transposing the Union's Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications are consistent with the right of journalists not to disclose their sources under Article 10 of the Convention and with the right to privacy under Article 8 of the Convention.

In sum, the Assembly recommends that the Committee of Ministers:

"17.1. call on those member states which do not have legislation specifying the right of journalists not to disclose their sources of information, to pass such legislation in accordance with the case law of the European Court of Human Rights and Committee of Ministers Recommendation No. R (2000) 7;

17.2. assist member states in analysing and improving their legislation on the protection of the confidentiality of journalists' sources, in particular by supporting the review of their national laws on surveillance, anti-terrorism, data retention and access to telecommunications records;

17.3. ask its competent steering committee to draw up, in co-operation with journalists' and media freedom organisations, guidelines for prosecutors and the police, as well as training material for judges, on the right of journalists not to disclose their sources of information, in accordance with Committee of Ministers Recommendations Nos. R (2000) 7 and Rec(2003)13 and the case law of the European Court of Human Rights;

17.4. ask its competent steering committee to draw up guidelines for public authorities and private service providers concerning the protection of the confidentiality of journalists' sources in the context of the interception or disclosure of computer data and traffic data of computer networks in accordance with Articles 16 and 17 of the Convention on Cybercrime and Articles 8 and 10 of the European Convention on Human Rights".

In some countries Recommendation (2000)7 of the Council of Europe has been an incentive to start developing at national level effective guarantees to protect the journalists' sources.

In ***the Netherlands*** in 2002 a circular letter ("Aanwijzing") of the college of attorneys-general contained the relevant guidelines for the police and the public prosecutor's office in order to respect the protection of journalistic sources[24]. Although these guidelines had no status of formal law, they were intended to reflect a clear option to protect journalistic sources in a confrontation with the police and the public prosecutor[25]. The Grand Chamber judgment of 14 September 2010 in the case of *Sanoma Uitgevers B.V. v. the Netherlands* has made clear however that these guidelines did not guarantee sufficient protection for the protection of journalistic sources in the Netherlands. A law proposal and a modification of the

[24]Openbaar Ministerie, Aanwijzing toepassing dwangmiddelen bij journalisten, *Stcrt.* 2002, 46 (Policy guidelines), *www.openbaarministerie.nl/beleidsregels/docs/2002a003.htm.* For a critical analysis, see C. BRANTS, "Grenzen van de journalistiek: vrije nieuwsgaring en de aanwijzing toepassing dwangmiddelen bij journalisten", *N.J.C.M.-Bulletin* 2002/7, 864-881.

[25]C. BRANTS, "Grenzen van de journalistiek: vrije nieuwsgaring en de aanwijzing toepassing dwangmiddelen bij journalisten", *l.c.,* 880. See also T. PRAKKEN, "Justitiële versus journalistieke waarheidsvinding", *NJB* 2004/12, 620-626.

guidelines has been announced in 2011, but until now only the Guidelines by the college of attorneys-general have been modified[26]. Although the new guidelines reflect in a better and more effective way the standards as they have been developed in the case law of the ECtHR, still by their nature of 'internal guidelines' for the police and public prosecutors, the guarantees reflected in the "Aanwijzing 2012" might not secure in a sufficient and effective way the protection of journalistic sources in the Netherlands[27].

In January 2010 in **France** the law on protection of journalistic sources had been modified substantially in order to meet the standards of the European Human Rights system (Law of 4 January 2010), although the new law is still considered insufficiently protective for the journalists' sources[28]. In a judgment of 7 December 2011 the Court of Cassation ruled that judge Philippe Courroye, the public prosecutor who initiated a procedure to identify information leaks in the "Woerth-Bettencourt" case in September 2010, had infringed the law on protection of sources by trying to access detailed phone records of three journalists working at the daily newspaper *Le Monde.* The Court of Cassation holds that the infringement of the confidentiality of journalists' sources was not justified by the existence of an overriding public interest and the measure was not strictly necessary and proportionate to the legitimate aim pursued[29].

Both in Luxembourg and Belgium steps have been taken earlier to implement the European Court's case law and the principles of the Recommendation of the Council of Europe on the protection of journalistic sources, especially after the judgments of 2003 in the cases *Roemen and Schmit v. Luxembourg* and *Ernst and others v. Belgium* (*cfr. supra*).

In ***Luxembourg*** the Law of 8 June 2004 ("Law on the freedom of expression in the media") explicitly recognises the protection of sources of journalists. The Articles 7 and 8 of the Law, under section "De la protection des sources" guarantee this right in line with the Recommendation (2000)7 of the Council of Europe.

In ***Belgium,*** a law proposal on the protection of journalistic sources has been introduced before parliament in October 2002, referring also to Recommendation (2002)7 of the Council of Europe. On 15 May 2003 the Minister of Justice published a circular letter ("Omzendbrief/circulaire") on the protection of sources. This circular letter, aimed to inform the public prosecutors, however only contained a short summary of the relevant case law of the European Court of Human Rights on the issue, without taking any further steps to develop the principles contained in this jurisprudence. In spring 2005 the Belgian Parliament finally approved the law on the protection of journalistic sources.

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[26]Openbaar Ministerie, Aanwijzing toepassing dwangmiddelen bij journalisten 1 maart 2012, Stcrt. 2012, 3656 and www.mediareport.nl/wp-content/uploads/2012/02/aanwijzing-toepassing-dwangmiddelen-tegen-journalisten-1-maart-2012.pdf. See also *Mediaforum* 2012/4 (Katern*, Aanwijzing toepassing dwangmiddelen journalisten,* i-iv).

[27]O. VOLGENANT, "Journalistieke bronbescherming", *Mediaforum* 2012/4, 117. See also http://www.kvdl.nl/KVdL/nl-NL/_main/Nieuws/Nieuwsbrief/Nieuwsbrief+april+2012/Journalistieke+bronbescherming/ and http://www.nuv.nl/nieuws/ndp-nieuws/nieuw-voorschrift-om-biedt-journalisten-betere.183361.lynkx.

[28]See www.lemonde.fr/societe/video/2010/09/13/il-y-a-une-loi-sur-la-protection-des-sources-il-faut-la-respecter_1410689_3224.html; www.slate.fr/story/27665/journalistes-protection-sources-affaires and http://europe.ifj.org/en/articles/efj-condemns-actions-by-french-government-against-journalists-rights.

[29]Cour d'appel de Bordeaux 5 May 2012 and Cassation 7 December 2011 : www.lemonde.fr/societe/article/2011/05/07/liberte-de-la-presse-la-justice-leve-une-menace_1518368_3224.html; http://combatsdroitshomme.blog.lemonde.fr/2011/12/12/protection-des-sources-journalistiques-parce-que-la-liberte-de-la-presse-le-vaut-bien-cass-crim-6-decembre-2011/ and www.liberation.fr/societe/01012376007-fadettes-pour-la-cour-de-cassation-courroye-a-viole-la-loi-sur-le-secret-des-sources. See also http://europe.ifj.org/en/articles/france-efj-welcomes-legal-victory-on-protection-of-journalists-sources.

5. The protection of journalists' sources and the Luxembourg Media Law of 8 June 2004

In 2004 Luxembourg has taken an important initiative in order to integrate the principles of the European Court's case law and of the Recommendation (2000) 7 into the law on freedom of expression in the media (Media Law)[30].

The Media Law of 8 June 2004 in its Article 7 guarantees that journalists heard as a witness by an administrative or judicial authority in the course of administrative or judicial proceedings shall be entitled to refuse to disclose information identifying a source, or the content of information that he has obtained or collected.

The positive evaluation made by P. Wachsmann in his report "*Analyse écrite du project de loi Luxembourgeois sur la liberté d'expression dans les médias*" is pertinent, especially with regard to the broad scope of application of Article 7 of the Luxembourg media law, an approach that is coherently in line with the Recommendation of the Council of Europe[31]. The Media Law not only protects journalists: also publishers and anyone who in course of their professional relations with a journalist have obtained knowledge of information identifying a source, can invoke the right to refuse disclosure of information.

The possibility of circumventing measures by the police or judicial authorities, such as searches, seizures and telephone tapping, in order to unmask the identity of a journalist's sources, is also explicitly restricted (Article 7, 3°). Judicial action and police authorities must refrain from ordering action or taking measures with the intention *or effect* (!) of circumventing this right. The Law explicitly refers to searches or seizures at the home or work place of journalists or the persons who are in a professional relation with them. Additionally Article 7, 4° of the Media Law considers as illegal evidence any information identifying a source, if this information is obtained by way of a legal judicial search or seizure which was not aimed at the disclosing the identity of a source.

The balance in respecting other human rights and the functioning of the judiciary is to be found in Article 8 of the media law, which stipulates that where the action of the administrative, judicial or police authorities concerns the prevention, prosecution or punishment of serious crimes against the person, drug-trafficking, money-laundering, terrorism or offences against the security of the State, journalists may not invoke the right of the protection of sources as it mentioned in Article 7. Article 8 clarifies to some extend what is meant by the European Court as "*an overriding requirement in the public interest*". This provision enumerates in other words the cases in which the protection of other interests prevails over the interest of not disclosing sources. The reference to serious crimes and some other offences refer to situations that are generally considered to be sufficiently serious to justify a restriction on the protection of sources. In these cases, the pre-eminence of a public interest to suppress and punish one of the behaviours covered is presumed and justifies exemption from the principle of protection of sources. The approach or Article 8 of the Luxembourg media law however is not fully in line with the European Court's case law and Recommendation (2000) 7. As Article 8 is formulated, it might open the door for a too wide application of disclosure orders, as both the aspect of subsidiarity and proportionality are not incorporated in this provision. It should indeed not be sufficient as such if an investigation deals with serious crimes against the person or some other offences. As Wachsman observed correctly in his analysis of the Luxembourg draft law "*la définition des cas dans lesquels est supprimé le bénéfice du droit de refuser la divulgation des informations identifiant une source et le contenu des informations obtenues ou collectées apparaît trop extensive, en contradiction avec ce que préconise la recommenda-*

[30]Article 7 and 8 of the Luxembourg Law of 8 June 2004 on the Freedom of Expression in the Media (Loi sur la liberté d'expression dans les medias, Memorial A- nr. 85, 1201.See also *Chambre des Députes* 2001-2002, n° 4910, Projet de loi sur la liberté d'expression dans les médias.

[31]P. WACHSMANN, "*Analyse écrite du project de loi Luxembourgeois sur la liberté d'expression dans les médias*", Council of Europe, Strasbourg, ATCM (2002)8, 16 p. Also available at www.humanrights.coe.int/media.

tion du Comité des Ministres et avec ce que suggère l'exposé des motifs lui-même". The way Article 8 is formulated, a journalist may not invoke his right of protection of sources from the moment an action, investigation or court case concerns a serious crime or an explicitly mentioned offence. It is obvious that this provision not only omitted to refer to the subsidiarity principle ("*it must be convincingly established that reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure*"). It is also necessary to incorporate as a basic condition in Article 8 that any disclosure order must pertinently motivate why the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure. Only by formulating it that way the public authorities are invited and obliged to motivate consistently why an overriding requirement of the need for disclosure is proved, that the circumstances are of a sufficiently vital and serious nature and that the necessity of the disclosure is identified as responding to a pressing social need. To some degree however Article 2 of the Media Law can help to reinstall the balance, as this Article provides that any restriction or interference in the freedom of expression as protected by Article 10 of the European Convention must be proportionate to the legitimate aim pursued ("toute restriction ou ingérence (..) doit répondre à un besion social impérieux et être proportionnée au but poursuivi").

A last remark with regard to the Luxembourg Media Law refers to the unclear situation whether a journalist can lose the protection of his sources as guaranteed by the law, if he has obtained information from a source that breached his or her obligation of secrecy of confidentiality[32]. In the Explanatory Memorandum of the draft media law it is said: "*Protection of sources is therefore required in the name of freedom of expression. It is important to stress that its purpose is not to guarantee the impunity of the journalist or the source. (..) Only a journalist who lawfully and legally has information may invoke it. The judicial authorities maintain the power to avail themselves of every means at their disposal to reveal the identity of a source*". The Explanatory Memorandum underlines also that "*it should be noted that if a journalist lawfully possesses information, he or she must be able to use it lawfully, even where the information is the product of an offence committed by the source. The journalist may not in this case be found guilty since he or she has not him- or her self-committed the offence*". It is mentioned in the Explanatory Memorandum that the journalist "*may not use this privilege where he or she is implicated as the author, co-author or accomplice of an offence*". The consequences of these different circumstances are not very clearly elaborated in the Luxembourg Media Law. The law left open some possibilities to circumvent the protection of journalistic sources. This holds the risks that journalistic sources in the future will not be protected on a sufficient level.

6. Belgium: law on the protection of journalists' sources (7 April 2005)

In Belgium the discussion about the (lack of) protection of journalists' sources has often been on, - and mostly after short time again off -, the political agenda[33]. Several law proposals have been introduced in

[32]See the references to the recent case law in Belgium, the United Kingdom and France.

[33]For an overiew 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 professionel. D'un faux problème à une vraie responsabilité", Journ. Proc, 1991/196, 33-35; M. BUYDENS, "Droits et obligations du professionel 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.

Belgian Parliament since 1984[34], but never a 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 2002[35].

Since the judgment in the case of *Ernst and others v. Belgium* (15 July 2003), in which the European Court of Human Rights condemned Belgium for unnecessary and disproportionate interferences by the judicial authorities which failed to respect the confidentiality of journalistic sources, journalists and their professional organisations have called for a legal framework to protect journalistic sources. The request 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 Convention[36]. 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.[37]

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 the usage of unlawfully obtained goods (*heling / recel*), nor for complicity in the offence of breach of professional secrecy.

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[34] *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.

[35] 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).

[36] 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

[37] ECtHR 27 November 2007, Tillack v. Belgium and Court of First Instance Brussels 29 June 2007, *A&M* 2007, 500. See also D. VOORHOOF (ed.), *Het journalistiek bronnengeheim onthuld*, Brugge, Die Keure, 2008.

In a judgment of 7 June 2006 the Court of Arbitrage (*Arbitragehof/Court d'Arbitrage*), the Belgian Constitutional Court, confirmed the constitutionality of the law on protection of journalistic sources, broadening for that purpose however the application of the law "*ratione personae*[38]".

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

- 1° Anyone directly contributing 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.

According to the new law, journalists 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 a 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*** 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 protecting journalistic sources in accordance with Article 10 of the European Convention[39]. The Belgian law of 7 April 2005 can undoubtedly inspire other countries to

[38]Arbitragehof 7 June 2006, nr. 91/2006*, A&M* 2008, 130. See also D. VOORHOOF, "Arbitragehof verruimt toepassing journalistiek bronnengeheim", *De Juristenkrant* 2006/132, 17.

[39]Notice however that the law of 4 February 2010 on Special Investigative Measures by State Security and Intelligence Services reduces to some extent the protection guaranteed by the Law of 7 April 2005: Wet van 30 november 1998

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"[40].

houdende regeling van de inlichtingen- en veiligheidsdiensten, gew. Wet van 4 februari 2010 betreffende de methoden voor het verzamelen van gegevens door de inlichtingen- en veiligheidsdiensten, *BS* 10 maart 2010. The law of 4 February 2010 makes, under strict conditions and with extra procedural guarantees towards only professional journalists (in the sense of the law of 30 December 1963), investigative measures and searches possible when journalists themselves are under a serious suspicion of being personally and actively involved in activities with a 'potential threat' to security, such as state security, international relations, military security, economic and scientific potential, espionage, terrorism… For such specific or exceptional investigative measures no court order is required: the authorization is only needed by the director of the state security services, after having obtained a positive advice by a special commission or the competent Minister. The president of the association of professional journalists is informed in advance in case such specific or exceptional investigative measures or searches against professional journalists will be undertaken. Also in other countries the legal framework applicable for and the methods used by security and intelligence services hold clear risks for breach of the right of protection of journalists' sources. See in this context the pending case *Telegraaf Media Nederland Landelijke Media B.V. a.o. v. the Netherlands* at http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx#{"display":["1"],"dmdocnumber":["909730"]}. On 19 June 2012 the European Court of Human Rights held a hearing on the case, webcasted via www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/

[40]ECtHR 27 March 1996, Goodwin v. the United Kingdom*, § 39.* See also D. BANISAR, *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources*, 2007, at www.privacyinternational.org and E. WERKERS and P. VALCKE, "The Journalist's Right not to reveal his Information Sources : continuing Battle or Truce established?", *European Journal of Consumer Law* 2011/3, 635-662. See also www.press-list.com/English/Release/OSCE2.php ; http://immi.is/FAQ; http://europe.ifj.org/assets/docs/108/130/d6b586c-bfdac82.pdf; http://europe.ifj.org/assets/docs/056/152/eaea138-f017a98.pdf and www.snj.cgt.fr/deontologie/sources.html