Grand Chamber Judgment on Protection of Journalists' sources,
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European Court of Human Rights reinforces protection of journalistic sources

ECtHR (Grand Chamber) 14 September 2010, Sanoma Uitgevers B.V. v. The Netherlands *(Application no. 38224/03)*

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Introduction

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 (see also our comment on *http://echrblog.blogspot.com/2009/04/protection-of-journalists-sources.html*). 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 (ECHR). 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. Inspired by the arguments of 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 5 Judges decided to refer the case to the Grand Chamber in application of Article 43 ECHR. By referring the case to the Grand Chamber the panel accepted that the Sanoma case raised a serious question affecting the interpretation or application of Article 10 ECHR and/or concerned a serious issue of general importance (Art. 43 § 2 ECHR).

Precisely one year later, the Grand Chamber of 17 judges has now, unanimously, on 14 September 2010 overruled the earlier Chamber judgment of 31 March 2009. 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 *ex ante* of review by a judge or other independent and impartial decision-making body, before the police or the public prosecutor have access to information capable of revealing such sources. As in the case of *Sanoma Uitgevers B.V. v. The Netherlands* such a guarantee was not existing, the Grand Chamber concludes, unanimously this time, 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*" (§ 100). Emphasizing the importance of the protection of journalistic sources for press freedom in a democratic society the Grand Chamber of the ECtHR found a violation of Article 10 ECHR.

The facts

The applicant, Sanoma Uitgevers B.V., is a limited liability company, specialising in publishing and marketing magazines, incorporated under Dutch law and based in Hoofddorp (the Netherlands). Relying on Article 10 (freedom of expression), the company complained of

having been compelled by the police authorities to hand over a CD-ROM that could reveal the identity of journalistic sources who, on the promise of anonymity, had provided information about an illegal street car race which took place in January 2002 and of which the publishing company took pictures. Despite the journalists strong objections to being forced to divulge material capable of identifying confidential sources, Sanoma was compelled to hand over the CD-ROM to the police.

The CD-ROM more precisely contained photographs, to be used for an article on illegal car racing. It was these photographs the police were interested in, investigating another crime. The police suspected that one of the cars (an Audi RS4) used in the race had also been used as the getaway car in a ram raid, during which a cash point machine was stolen and a bystander threatened with a firearm. For that reason the police tried to order Sanoma to surrender the CD-ROM containing the photographs for seizure. Sanoma first refused, in order to protect the confidentiality of their journalistic sources. The Amsterdam public prosecutor then issued the company with a summons under Article 96a of the Code of Criminal Procedure (Article 96a) to surrender the photographs and any related material concerning the race. The magazine's editor-in-chief still refused, again invoking the journalists' undertaking not to identify the participants. Subsequently he was arrested and brought before the Amsterdam public prosecutor. He was released a few hours later.

A short time later Sanoma Uitgevers B.V.'s lawyer obtained the agreement of the public prosecutors to seek the intervention of the duty investigating judge of Amsterdam Regional Court, who, although recognising from the outset that he had no legal competence in the matter, took the view that the needs of the criminal investigation outweighed the applicant company's journalistic privilege. The next day Sanoma finally, under protest, surrendered the CD-ROM, which was then officially seized.

Sanoma lodged a complaint before the Regional Court, seeking the lifting of the seizure and restitution of the CD-ROM, an order to the police and prosecution to destroy copies of the data recorded on the CD-ROM and an injunction preventing the police and prosecution from using information obtained through the CD-ROM. On 19 September 2002 the court granted only the request to lift the seizure and to return the CD-ROM. A few months later Sanoma's subsequent appeal in cassation was declared inadmissible by the Supreme Court (*Hoge Raad*) on 3 June 2003.

The judgment of the Chamber (Third Section) of 31 March 2009

Sanoma lodged an application with the European Court of Human Rights on 1 December 2003, invoking a violation of their right to protect their journalistic sources as guaranteed under Article 10 of the Convention.

About 5 years later, on 31 March 2009, the Court found that, although in principle a compulsory handover of journalistic material might have a chilling effect on the exercise of journalistic freedom of expression, the Netherlands authorities were not prevented from balancing the conflicting interests involved in the case. In particular, the information contained on the CD-ROM had been relevant and capable of identifying the perpetrators of other crimes investigated by the police and the authorities had only used that information for those purposes. The Chamber therefore held, by four votes to three, that there had been no violation of Article 10 ECHR.

Referring to the facts of the case, the Court's majority of four judges was of the opinion that:

"58. The crimes were serious in themselves, namely the removal of cash dispensers by ramming the walls of buildings in public places with a shovel loader. Not only did they result in the loss of property but they also had at least the potential to cause physical danger to the

public. At a ram raid perpetrated on 1 February 2002 the perpetrators made use of a firearm to facilitate their crime (..). It was only after the threat of potentially lethal violence was made that the police and the public prosecutor were moved to demand from the applicant company the information which was known to be in their possession.
59. The Court is satisfied that the information contained on the CD-ROM was relevant to these crimes and, in particular, capable of identifying their perpetrators.
60. Given that the participation of the suspected vehicle in the street race only became known to the police after the race had taken place, the Court is satisfied that no reasonable alternative possibility to identify the vehicle existed at any relevant time".

Although the European Court expressed some hesitations regarding the way the authorities in the Netherlands had acted in this case, the Chamber was of the opinion that there was no breach of Article 10 ECHR:

"62. Finally, the Court has had regard to the extent of judicial involvement in the case. It is disquieting that the prior involvement of an independent judge is no longer a statutory requirement (..). As it was, the public prosecutor obtained the approval of the investigating judge even without being so obliged by domestic law (..); the Court considers this, as an addition to the applicant company's entitlement under statute of review post factum of the lawfulness of the seizure by the Regional Court (..), to satisfy the requirements of Article 10 in the present case.
63. The Court is bound to agree with the Regional Court that the actions of the police and the public prosecutors were characterised by a regrettable lack of moderation (..). Even so, in the very particular circumstances of the case, the Court finds that the reasons advanced for the interference complained of were 'relevant' and 'sufficient' and 'proportionate to the legitimate aims pursued'. There has accordingly been no violation of Article 10 of the Convention".

Three judges firmly expressed their disagreement with the majority of the Court and argued that there has been a violation of Article 10 of the Convention (dissenting opinion of judge Power, joined by judges Gyulumyan and Ziemele).

The dissenters pointed out that the police "*without any prior judicial assessment or authorisation, arrived at one of the applicant's editorial offices, ordered the editors to surrender all photographic and other materials required for an investigation, declined to give details as to the necessity for the demand, refused to entertain any objection based on journalistic undertakings of confidentiality, threatened, arrested and detained the editor in chief and further threatened to close and search all of the applicant company's premises for an entire weekend (§§ 10-13). What occurred in this case, (..) is not far removed from (and in certain respects goes beyond) the type of 'drastic measure' previously criticised by this Court in finding a violation of Article 10 of the Convention. The absence of any statutory requirement for prior judicial involvement in a case such as this, is (..) somewhat more than 'disquieting' (as the majority considers) and the actions of the police are a great deal more than 'regrettable'* (§§ 62, 63)".

The dissenters also referred to the fact that "*the distinction between a journalist's 'sources' and his or her 'materials' (such as, notes, recordings, photographs) forms part of the rationale relied upon by the majority in its finding of no violation in this case (see §§ 57, 61)"* and that " *(..), great caution should be exercised before the law draws too sharp a distinction between such matters. The purpose of the legal of protection of sources is founded upon an important point of principle. This protection is granted to ensure that those who (for reasons of fear or otherwise) disclose, secretly, to journalists matters that are of public interest are not discouraged from so doing by the risk that their identities may be revealed. If legal protection is to be limited, strictly, to non-disclosure of 'sources' then such sources may suddenly 'shut up', fearful that their identities will be ascertainable once the journalist to whom confidential*

data has been given is no longer its sole custodian. Such a risk of indirect disclosure is likely to discourage an otherwise courageous 'source' from bringing matters of vital interest into the public domain. (..), it is not of pivotal significance that the intention behind a given interference is to identify evidence rather than individuals. It is the fact of interference (with its attendant risk of source identification) that undermines and weakens the worth of a journalist's undertaking. Thus, this Court imposes a high threshold of 'necessity' before finding that such interference can be compatible with Article 10".

The dissenters were finally of the opinion that "*because of the importance of the principle at stake, the journalist should be the last, rather than the first, means of arriving at evidence required. Where, in the public interest, a pressing social need to interfere with journalistic confidentiality is asserted then the determination of whether relevant and sufficient reasons have been adduced to substantiate that claim should be made by a competent court having 'heard' the competing public interest. Otherwise, the police become judges in their own cause and a fundamental right protected under Article 10 of the Convention is thereby undermined to the detriment of democracy*". They concluded that the actions of the police in this case were a breach of Article 10 of the Convention, formulating the warning that "*in finding no violation, the majority merely wags a judicial finger in the direction of the Netherlands authorities but sends out a dangerous signal to police forces throughout Europe, some of whose members may, at times, be tempted to display a similar 'regrettable lack of moderation'*". The fear was expressed that this judgment would "*render it almost impossible for journalists to rest secure in the knowledge that, as a matter of general legal principle, their confidential sources and the materials obtained thereby are protected at law*".

Critical reactions on the Court's judgment of 31 March 2009

The judgment of the Third Section of the ECHR was a surprising one. So far dealing with the issue of protection of journalistic sources, the ECtHR had consistently recognised that the protection of journalistic sources and materials constitutes a basic condition for press freedom, without which 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. In a series of judgments (*Goodwin v. United Kingdom* (no. 17488/90, 27 March 1996), *Roemen and Schmit v. Luxembourg* (no. 51772/99, 25 February 2003), *Ernst a.o. v. Belgium* (no. 33400/96, 15 July 2003), *Voskuil v. The Netherlands* (no. 64752/01, 22 November 2007), *Tillack v. Belgium* (no. 20477/05, 27 November 2007) and *Financial Times Ltd. a.o. v. United Kingdom* (no. 821/03, 15 December 2009)), the Court has elaborated the 'privilege' of protection of journalistic sources and applied it in different circumstances. In 2000 the Council of Europe's Committee of Ministers issued Recommendation 2000/7 on the protection of journalistic sources. The Committee of Ministers reaffirmed the importance of this principle in its 2007 Declaration on the protection and promotion of investigative journalism, in which it stressed the importance of "*right of journalists to protect their sources of information in accordance with Council of Europe standards*".

By introducing ambiguity concerning the statutory and procedural safeguards for the protection of journalistic sources and in not finding a violation of Article 10 the Third Section's judgment of 31 March 2009 in *Sanoma Uitgevers B.V. v. the Netherlands* risked to undermine these standards. It is important to note that the Third Section's judgment explicitly disapproved the way the Dutch authorities acted, stating that "*the actions of the police and the public prosecutors were characterised by a regrettable lack of moderation*" (§ 63). Furthermore, it found it "*disquieting*" that prior judicial authorisation is not required under Dutch law (§ 62). Nevertheless, the majority of the Third Section estimated that the informal involvement of an investigative judge and the ex post judicial review by the Regional Court remedied these shortcomings and satisfied the requirements of Article 10 ECHR.

However, there were good arguments to consider that the informal nature of the judicial authorisation in this case – a phone call – had certainly deprived Sanoma from any means of challenging the decision. Prior judicial authorisation should be a key component of any regime of safeguards for the protection of journalistic sources. Indeed it can be argued that only an order by an independent judge holds a sufficiently guarantee that the various conflicting interests will be balanced and that a disclosure order will be sufficiently fine tuned and proportionate, as was the case in the Court's decision in *Nordisk Film & TV v. Denmark* (no. 40485/02, 8 December 2005).

The perception was that the Court's judgment of 31 March 2009 in *Sanoma Uitgevers B.V. v. the Netherlands* risked to undermine the necessary high standards of protection of journalistic sources to the extent that it appeared to condone interference with journalistic sources without prior formal judicial scrutiny, and without proof of exhaustion of alternative sources of information. Media companies, journalists and organisations advocating investigative journalism rightly believed that if this precedent would stand, police forces and public prosecutors across Europe may consider themselves free to exercise a lack of moderation. Journalists feared finding themselves the first resort – not the last – when the authorities begin investigations into newsworthy subjects. If journalistic operations are subject to the threat of searches and seizures, and journalists are not able to fully protect their sources, this would greatly impede the media's ability to gather and report information of public interest.

NGOs and media formulating their concern with the judgment of 31 March 2009 argued that "*the Third Section's judgment essentially sanctions interference with journalistic sources without any formal prior judicial scrutiny – or any external scrutiny. We are in no doubt that this will result in police forces or public prosecutors across Europe acting "*without lack of moderation*", to the detriment of not only the individual journalist's right to freedom of expression but the right of society as a whole to be informed on matters of public interest*". Therefore they urged that the Third Section's judgment of 31 March 2009 was to be referred to the Grand Chamber, to bring the final judgment in this case in line with the established case law of the European Court of Human Rights regarding protection of journalistic sources, "*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*". It was emphasized that indeed *"limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court*".

The judgment of the Grand Chamber of 14 September 2010

After the decision by the panel of 5 judges on 14 September 2009 to refer the case to the Grand Chamber, the hearing took place on 6 January 2010 (*http://coe.echr.org/webcast*) and the Court delivered its judgment on 14 September 2010.

In its judgment the Grand Chamber 'overrules' the finding of the Third Section by emphasizing the importance of protection of journalistic sources in the light of Article 10 ECHR. The Grand Chamber of the European Court starts from its established case law, reiterating that *"the right of journalists to protect their sources is part of the freedom to "receive and impart information and ideas without interference by public authorities" protected by Article 10 of the Convention and serves as one of its important safeguards. It is 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. The Court has always subjected the safeguards for respect of freedom of expression in cases under Article 10 of the Convention to special scrutiny. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be*

compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest" (§ 50-51).

The crucial question the Grand Chamber needed to decide on was whether the action by the police and the public prosecutor ordering to reveal the journalistic material at issue met sufficient legal and procedural guarantees for adequate protection of journalistic sources under Article 10 of the Convention. The key question was: had the law in the Netherlands provided a sufficient procedural guarantee of this kind? In essence the Chamber in its judgment of 31 March 2009 was satisfied indeed that a statutory basis for the interference complained of existed, namely Article 96a of the Code of Criminal Procedure. While recognising that that provision did not set out a requirement of prior judicial control, the Chamber gave decisive weight to the involvement of the investigating judge in the process. Although the Chamber found it unsatisfactory that prior judicial control by the investigating judge was no longer a statutory requirement, as it had been until Article 96a entered into force, it saw no need to examine the matter further and concluded that there was no violation of Article 10.

The Grand Chamber however is of the opinion that procedural safeguards proscribed by law should inherently be part of the protection of journalistic in application of Article 10 ECHR. According to the Court "*first and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body*" (§ 90). The Court is of the opinion that "*given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed*" (§ 90). The Grand Chamber emphasizes that "*the requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not*" (§ 90).

The Court says it is well aware that it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent orders or requests. In such situations an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether in the particular circumstances of the case the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection. It is clear however, in the Court's view, "*that the exercise of any independent review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality*" (§ 91). The Court continues to emphasize the necessity of the "ex ante"-character of such independent review: "*Given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed. The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established. It should be open to the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalist's sources (..). In situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk"* (§ 92).

The Court underlines that 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*" (§ 93).

Furthermore the Grand Chamber is of the opinion that the involvement of the investigating judge in this case could not be considered to provide an adequate safeguard. It notes, firstly, the lack of any legal basis for the involvement of the investigating judge. Secondly, the Court points out that the investigating judge was called in what can only be described as an advisory role, as the investigating judge had no legal authority in this matter. Thus it was not open to him to issue, reject or allow a request for an order, or to qualify or limit such an order as appropriate. Such a situation is scarcely compatible with the rule of law. These failings were not cured by the review *post factum* offered by the Regional Court, which was likewise powerless to prevent the public prosecutor and the police from examining the photographs stored on the CD-ROM the moment it was in their possession (§ 97-99).

On these grounds the Grand Chamber reaches the conclusion 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. There has accordingly been a violation of Article 10 of the Convention in that the interference complained of was not "prescribed by law*"" (§ 100).

Sanoma Uitgevers B.V. submitted a claim, supported by time-sheets, in respect of costs and expenses of EUR 117,133.15 in total, as the costs and expenses of the domestic proceedings were 49,111.15 EUR, while the claim for costs and expenses in respect of the proceedings before the Grand Chamber was 68,022.00 EUR. The Court however found that the sums claimed are not reasonable as to quantum either as regards the hourly rates applied or as regards the number of hours charged. Making its own assessment based on the information contained in the case file, the Court considers it reasonable to award EUR 35,000 in respect of costs and expenses to Sanoma Uitgevers.

It is also interesting to note the concurring opinion by the Netherlands judge Myjer, annexed to the judgment. Judge Myjer has been one of the majority of the Chamber which found no violation. In a separate concurring opinion judge Meyer explains why he now found with the majority of the Grand Chamber that there has been a violation of Article 10 ECHR. Judge Myjer *inter alia* referred to the remark made in the dissenting opinion appended to the Chamber judgment of 31 March 2009, emphasizing that "*in finding no violation, the majority merely wags a judicial finger in the direction of the Netherlands authorities but sends out a dangerous signal to police forces throughout Europe, some of whose members may, at times, be tempted to display a similar 'regrettable lack of moderation'*". According to judge Myjer that was ultimately the push he needed "*to be persuaded to cross the line and espouse an opinion opposite to that which I held earlier. I am bound to admit that the Grand Chamber's judgment provides clear guidance for the legislation needed and the way in which issues like these should be addressed in future*".

Impact of the judgment and future perspectives

The importance and the impact of the Grand Chamber judgment of 14 September 2010 cannot be underestimated. The Court not only expects that the Netherlands' authorities will promptly promulgate a legal basis containing the guarantees for an ex ante decision by a judge or independent and impartial body in matters of disclosure of journalistic sources. Also other member states of the European Convention will need to prescribe by law the necessary

adequate safeguards in this context. The judgment of the Grand Chamber has manifestly added an extra layer of protection for journalistic sources, as until now the Committee of Ministers' Recommendation (2000) 7 "*on the right of journalists not to disclose their sources of information*" (8 March 2000) only guaranteed a weaker judicial control. Indeed Principle 4 of the Recommendation stipulates that "*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")*", while the explanatory memorandum of Recommendation 2000/7 went a step further prescribing that "*judicial authorities ordering search or seizure of journalistic material should limit their search and seizure order with respect to the protection of a journalist's source*". The Court's judgment of 14 September 2010 has now further clarified and developed these principles into strict procedural safeguards. There is no doubt that to be in line with the Court's application of Article 10 ECHR in matters of protection of journalistic sources, member states shall build in additional procedural safeguards in terms of an ex ante judicial review based on clear criteria, applying a strict test of subsidiarity (reasonable alternatives do not exist or have been exhausted) and proportionality test (the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure), as already stipulated in Principles 3 and 4 of the 2000/7 Recommendation of the Committee of Ministers on the protection of journalistic sources.