

COUNCIL OF EUROPE

COMITTEE OF MINISTERS

EXPLANATORY MEMORANDUM

**to Recommendation No. R (00) 7
of the Committee of Ministers to member states
on the right of journalists not to disclose their sources of information**

*(Adopted by the Committee of Ministers on 8 March 2000
at the 701st meeting of the Ministers' Deputies)*

I. Introduction

1. At the 4th European Ministerial Conference on Mass Media Policy, held in Prague in December 1994, the participating Ministers agreed in Principle 3 (d) of Resolution No. 2 on journalistic freedoms and human rights that "the protection of the confidentiality of sources used by journalists" was essential to enable journalists to perform their function and to contribute to the maintenance and development of genuine democracy. Accordingly, they invited the Committee of Ministers of the Council of Europe to examine national and international law and practice concerning the confidentiality of journalists' sources of information. Against this background, the Steering Committee on the Mass Media (CDMM) decided in 1996, to set up a committee of experts named *Group of Specialists on Media Law and Human Rights* (MM-S-HR), with a mandate to work *inter alia* on this issue. In addition to governmental experts, the International Federation of Journalists, the International Centre against Censorship/Article 19 and the European Broadcasting Union participated as observers in the Group's work, which led to this Recommendation and its Explanatory Memorandum. The Committee of Ministers adopted the Recommendation on 8 March 2000 and authorised the Secretary General to publish this Explanatory Memorandum.

2. It should be noted that the European Parliament has also addressed this issue in its Resolution of 18 January 1994 on the confidentiality of journalists' sources and the right of civil servants to disclose information (see, Official Journal of the European Communities, No. C, 44/34).

3. Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "European Convention on Human Rights" or "Convention") is the basis of this Recommendation. The European Court of Human Rights recognised in its judgment *Goodwin v. the United Kingdom* (27 March 1996) that Article 10 of the Convention includes the right of journalists not to disclose their source of information. The Court also stressed that the "protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States (...)" (see, Eu. Court H.R., *Goodwin v. the United Kingdom*, 27 March 1996, para. 39). The Court continued that "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. 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 justified by an overriding requirement in the public interest" (see, *ibid.*).

4. The MM-S-HR concluded that it is desirable to reinforce and supplement through a Recommendation the principles established by the judgment *Goodwin v. the United Kingdom*. In a state governed by the rule of law, police and judicial authorities are bound to base their actions on the law and to use their discretion within the scope and spirit of the law. In this regard, a Recommendation addressed to the member States provides a basis for common European minimum standards concerning the right of journalists not to disclose their sources of information.

5. The focus of this Recommendation is the requirements for an adequate protection of the right of journalists not to disclose their sources of information, in order to safeguard freedom of journalism and the public's right of information by the media. The protection of the professional relationship between journalists and their sources is in this respect of higher importance than the actual value of the information for the public, as the European Court of Human Rights has held (see, *Goodwin v. the United Kingdom*, para. 37 at the end). Any disclosure of a source may have a chilling effect on the readiness of future sources to provide journalists with information, irrespective of the kind of information provided by the source. The guidelines appended to this Recommendation therefore establish common principles for the right of journalists not to disclose their sources of information in the light of Article 10 of the European Convention on Human Rights.

6. In accordance with Article 10 of the Convention, this right of journalists is not an absolute right. Article 10, paragraph two of the European Convention on Human Rights stipulates possible limitations, similar to Articles 19 and 29, paragraph 2 of the Universal Declaration of Human Rights and Article 19, paragraph 3 of the International Covenant on Civil and Political Rights. An explanation of these limitations is given under Principle 3 of this Recommendation and the relevant chapters in this Explanatory Memorandum.

7. Some member States of the Council of Europe have introduced in their domestic law the strict obligation to keep the confidentiality of journalists' sources, which binds even journalists themselves. With regard to the Recommendation, the MM-S-HR felt that there was no necessity to legally sanction journalists who decided to disclose their sources, for example for journalistic reasons. Journalists would generally have a strong professional interest in keeping their sources confidential, in order not to deter their future sources and hence undermine their own future work. It was also recognised that some professional codes of conduct of journalists include the obligation for journalists themselves not to disclose a source of information which contacted them confidentially. Therefore, this Recommendation is limited to the right of journalists not to disclose their sources, instead of an obligation of journalists. This should not prevent member States from introducing in their national legislation a higher protection of the sources, also *vis-à-vis* journalists.

8. The Recommendation takes into account the national systems of protection established in some member States in the framework of law or legal practice, for

example, by a specific right of journalists to refuse giving evidence before a court with regard to their professional work. The Recommendation does not aim at prescribing particular limits to such rights of journalists or to lower the standards of protection already secured at national level. On the contrary, it intends to enhance those rights.

II. Commentary

Definitions

9. For the precise application of the Recommendation, it is necessary to specify the meaning of certain terms. The definitions contained herein shall not attempt to define those terms as such, but are given for the purposes of the Recommendation only.

a. Journalist

10. The definition of the term "journalist" is a prerequisite for this Recommendation. The protection of the confidentiality of sources of information is limited to journalists, due to their role and importance in the information process and the public's right of information by the media and hence indirectly via the work of journalists. Subject to Principle 2, individuals who are not journalists are not covered by this Recommendation.

11. It is generally understood that the right to freedom of expression implies free access to the journalistic profession, i.e. the absence of the requirement of an official admission by state organs or administrations. This principle is reflected in Principle 11 (b) of Recommendation No. R (96) 4 on the protection of journalists in situations of conflict and tension, which requires that, even in situations of conflict and tension, "the exercise of journalism and journalistic freedoms is not made dependent on accreditation". In the same vein, Resolution No. 2 on journalistic freedoms and human rights by the 4th European Ministerial Conference on Mass Media Policy (Prague, 1994) stipulates in Principle 3 (a) that "unrestricted access to the journalistic profession" enables journalism to contribute to the maintenance and development of genuine democracy.

12. The European Court of Human Rights has not specified the requirements for being considered a journalist under Article 10 of the European Convention on Human Rights. In its judgment *Goodwin v. the United Kingdom* (27 March 1996), the Court acknowledged that the trainee journalist, Mr Goodwin, who had been employed for three months when he was contacted by his source, was a "journalist".

13. In some member States, domestic laws provide a definition of who is a journalist. The Recommendation does not intend to alter those laws, but sets out a number of factual requirements for the purposes of this Recommendation:

- (i) A journalist is typically a natural person. The holder of the information provided by the source may be, however, not only the journalists themselves but also their employers. Therefore, legal entities like publishing companies or news agencies are also to be protected like "journalists" under this Recommendation. The European Court of Human Rights recognised in its judgment *De Haes and Gijssels v. Belgium* (24 February 1997) that the editor of a journal and the journalist working for this journal would qualify in the same way for the right not to disclose a source under Article 10 of the Convention.

(ii) The MM-S-HR was of the opinion that a certain occupational tendency should be required, i.e. a journalist typically works regularly and receives some form of remuneration for his or her work. Therefore, the Recommendation uses the terms "regularly or professionally engaged". This must not exclude, however, journalists who work freelance or part-time, are at the beginning of their professional career, or work on an independent investigation over some time. Professional accreditation or membership is not necessary. Nevertheless, individuals who otherwise would not regard themselves as being journalists shall not qualify as journalists for the purposes of this Recommendation. The latter category may include, for example, individuals who write letters to the editor in the print media, appear as guests on broadcasting programmes or participate in discussion fora in computer-based media. The MM-S-HR took into account the history of this protection and paid attention to the fact that the protection of sources is a vital prerequisite for the work of the media in a democratic society, but not for all forms of communication by individuals. A limitation of this protection to journalists in the above sense will also facilitate the balancing of possible conflicting rights and values foreseen in Principle 3.

(iii) The term "collection and dissemination (...) to the public via any means of mass communication" shall refer to the fact that information is made available to the public at large or to a wider and open group of recipients, like subscribers, customers or members. Persons engaged in the creation and dissemination of personalised correspondence or advertisements are not meant hereby. All kinds of communication techniques can be used, including non-periodical publications and audiovisual works. Therefore, press journalists, photo journalists, radio journalists, audiovisual journalists and journalists working for computer-based media are equally included.

14. In those member States where systems of protection of sources already exist, protection was originally intended for journalists working for the traditional mass media (e.g. newspapers, broadcasters). However, there is no argument to limit such protection to these persons and to apply a different regime to those working professionally in the collection and dissemination of information via new means of communication such as the Internet. This being said, member States may find it more difficult to define the characteristics of the professional work of journalists who exclusively use these new means of communication, in order to justify the same protection, due to the development of new professions in this area. Against this background, the broad scope of the definition is aimed at avoiding that the Recommendation needs to be amended in the near future. It should be underlined, however, that a step-by-step approach by member States may prove advisable in implementing the principles laid down in the Recommendation as regards new means of communication.

b. Information

15. The right of the public to receive information and the public interest in protecting the relationship between journalists and their sources are the reasons for protecting the identity of those persons who provide this information to journalists. The value of the

information for the public or the degree of public interest in the information is not decisive for the protection of the right of journalists not to disclose their sources, as the European Court of Human Rights has held (see, *Goodwin v. the United Kingdom*, para. 37). It is therefore part of the protected freedom of journalism under Article 10 of the Convention to have journalists decide themselves on the news potential of their information.

16. Sources of information might have an interest in remaining unknown to the public, for instance because they are under an obligation not to disclose information or because they might face some kind of legal or factual sanction for disclosing information. The Recommendation covers not only statements of fact, but also applies to statements of opinions and ideas. The nature of the information is not relevant and can include oral or written statements, sounds or pictures.

c. Source

17. Any person who provides information to a journalist shall be considered as his or her "source". The protection of the relationship between a journalist and a source is the goal of this Recommendation, because of the "potentially chilling effect" an order of source disclosure has on the exercise of freedom of the media (see, Eu. Court H.R., *Goodwin v. the United Kingdom*, 27 March 1996, para. 39). 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.

d. Information identifying a source

18. In order to protect the identity of a source adequately, it is necessary to protect all kinds of information which are likely to lead to the identification of a source. The potential to identify a source therefore determines the type of protected information and the range of such protection. As far as its disclosure may lead to an identification of a source, the following information shall be protected by this 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.

19. This list is not necessarily exhaustive. Paragraph *c* has to be read and interpreted in a manner which allows an adequate protection of a source in a given case. The decisive factor is whether any additional information is likely to lead to the identification of a source.

Principle 1 (Right of non-disclosure of journalists)

20. Principle 1 recommends that member States provide in their domestic law and practice for an explicit and clear protection of the right of journalists not to disclose their sources, for example by introducing new legislation or examining existing legislation with a view to its amendment, if necessary. The term "domestic law and practice" corresponds to the term "prescribed by law" in Article 10, paragraph 2 of the Convention, as interpreted by the European Court of Human Rights. It might, therefore, include a sufficiently established and precise body of case law by national superior courts applying general principles of their domestic law (see also Principle 3.a).

21. The right of journalists not to disclose their source is part of their right to freedom of expression under Article 10 of the Convention. Article 10 of the Convention, as interpreted by the European Court of Human Rights, is binding on all Contracting States. Due to the importance of the protection of the confidentiality of journalists' sources for the media in a democratic society, national legislation should provide an accessible, precise and foreseeable protection. It is in the interest of journalists, journalists' sources and public authorities alike to have precise and clear legislative norms in this field. These norms should be guided by Article 10, as interpreted by the European Court of Human Rights and this Recommendation. A stronger protection of the confidentiality of journalists' sources of information under domestic law shall not be excluded by this Recommendation. As far as a right of non-disclosure exists, journalists may lawfully refuse to disclose information identifying a source without being exposed to any civil or criminal liability or any penalty for their refusal.

Principle 2 (Right of non-disclosure of other persons)

22. Also "other persons" active in the media sector than journalists should be entitled not to disclose a source of information, if they acquire knowledge of this source through the collection, editorial processing or dissemination of the information. The knowledge of the source has to be acquired by these other persons in the framework of their "professional relations with journalists". Secretarial staff, journalistic colleagues, printing staff, the editor or the employer of a journalist might have access to information identifying a source. Journalistic work and the dissemination of information via the media might even require journalists to disclose such secret information inside their office, without revealing it publicly. It is therefore necessary to extend the protection to these persons in order to maintain the secrecy of a source towards third persons or the public, if they are not already covered by the definition of journalist under national systems of protection. Staff of news agencies may also qualify hereunder, if they are active in the collection and dissemination of information. Member States which intend to offer greater protection to sources are free to take measures to oblige the above "other persons" to respect the confidentiality of sources.

23. In its judgment *De Haes and Gijssels v. Belgium* (27 February 1997, para. 55), for

example, the European Court of Human Rights extended the right not to disclose information identifying a source to an editor and a journalist alike.

Principle 3 (Limits to the right of non-disclosure)

a. legitimate aim under Article 10 of the Convention

24. The European Court of Human Rights has repeatedly underlined the requirement under Article 10, paragraph 2 of the European Convention on Human Rights, that limitations to Article 10 must be "prescribed by law". The Court has held that "relevant national law must be formulated with a sufficient precision to enable the persons concerned - if need be with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail", and be formulated with sufficient clarity to provide the individual "adequate protection against arbitrary interference" by public authorities through an unlimited discretion (see, for instance, *Goodwin v. the United Kingdom*, 27 March 1996, para. 31).

25. Furthermore, the European Court of Human Rights has stressed that any restriction to the freedoms protected by Article 10, paragraph 1 of the European Convention on Human Rights must pursue a legitimate aim under Article 10, paragraph 2 of the Convention. Article 10, paragraph 2 of the Convention enumerates grounds for the restriction of freedom of expression, without establishing a hierarchy among them. Any restriction of the right of journalists not to disclose information identifying their source and of the public interest in the non-disclosure must be based on a legitimate interest from among these grounds. In this respect, Article 10, paragraph 2 has to be interpreted narrowly, in accordance with the established jurisprudence of the European Court of Human Rights. Therefore, the legitimacy of an interest has to be established by reference to those grounds which can possibly override the rights and interests in the protection of the confidentiality of journalists' sources of information.

26. Thirdly, when evaluating whether a particular legitimate interest under Article 10, paragraph 2 of the Convention justifies the restriction of the right to freedom of expression, the European Court of Human Rights applies a balancing test which determines whether a restriction is "necessary in a democratic society" (see, *Sunday Times v. the United Kingdom (no. 2)*, 26 November 1991, para. 50). In order not to depart from Article 10, paragraph 2 of the Convention, the MM-S-HR decided not to list a set of specific legitimate interests which might justify mandatory source disclosure. Instead, the text of the Recommendation includes a series of checks and criteria which must be taken into account when assessing the legitimate interest.

27. The Recommendation reaffirms the balancing test used by the European Court of Human Rights when determining whether a restriction is "necessary in a democratic society" under Article 10, paragraph 2 of the European Convention on Human Rights (see, *Sunday Times v. the United Kingdom (no. 2)*, 26 November 1991, para. 50). The right of journalists not to disclose their source and the public's interest in being informed by the media are to be considered as essential in any democratic society. The European Court of Human Rights has held that the media do not only have the task of imparting information and ideas on matters of public interest, but the public has also a right to receive them (see, *Fressoz and Roire v. France*, 21 January 1999, para. 51). The chilling effect of the disclosure of a source by a journalist will impede this role of the media. Hence, national courts and authorities shall pay particular regard to the importance of the right of journalists not to disclose their sources.

28. The disclosure of information identifying the source should therefore be limited to exceptional circumstances where vital public or individual interests are at stake and can be convincingly established (see, Eu. Court H.R., *Goodwin v. the United Kingdom*, 27 March 1996, para. 37). 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, paragraph 2 of the European Convention on Human Rights. Paragraph *b* of this Principle stipulates requirements for the evaluation of such necessity. In this context, it should be recalled that some of those interests of individuals may also be protected by other rights under the Convention (e.g. the right to a fair trial).

b. necessity of the disclosure

29. As referred to in paragraph *a* of this Principle, competent national authorities are held to pursue an adequate balancing of a legitimate interest in the disclosure with the right of journalists to maintain the confidentiality of their sources and the public interest in the non-disclosure. Paragraph *c* sets out the requirements for determining the necessity of the disclosure.

30. The need for any restriction on freedom of expression must be convincingly established, as the European Court of Human Rights has regularly held (see, *Sunday Times v. the United Kingdom (no. 2)*, 26 November 1991, para. 50). Paragraph *b* therefore requires that it can be convincingly established that a legitimate interest in the disclosure exists which clearly outweighs the public interest in the non-disclosure. Convincingly in this respect shall refer to the requirement of evaluating the facts of a given case as well as the use of discretion established in a way which is open to later verification. It is recommended that the competent authorities specify the reasons why a serious interest outweighs the interest in the non-disclosure. This open balancing ensures not only public scrutiny, but enables also the possible later review of the imposition of a sanction on journalists for not disclosing their source under Principle 5, paragraph *d* of the Recommendation.

i. absence of reasonable alternative measures

31. Beyond the existence of an overriding legitimate interest in the disclosure, necessity in the sense of this paragraph requires that this overriding interest cannot be realised without the disclosure, i.e. the causality between the disclosure and the realisation of the legitimate interest must be established.

32. A disclosure should only be justified if and after other means or sources have been unsuccessfully exhausted by the parties to a disclosure proceeding. Such measures may, for example, include an internal investigation in a case where secret internal information about an enterprise or administration was disseminated, the reinforcing of restrictions on access to certain secret information, general police investigations or the dissemination of contrasting information as a countermeasure. The parties to a disclosure proceeding should also exhaust other non-journalistic sources at first before demanding the disclosure of the source by the journalist. Alternative sources who could be subject to an alternative investigation and enquiry may include, for example, employees, colleagues, contracting partners or business partners of the person requesting the disclosure. In States which protect the confidentiality of sources as such, it might not be possible to demand information from alternative persons under domestic law. Other persons, however, who are linked to the work of a journalist and thereby acquire knowledge of the journalist's source, are protected by Principle 2 of

this Recommendation.

33. Information becomes relevant, in most instances, through its wide dissemination. The provision of information to a journalist might violate certain rights or interests, but it is the later public dissemination of this information by the journalist, which concerns these rights or interests to a much greater extent. Therefore, a total or partial restriction on the dissemination of this information by the journalist might sufficiently protect the rights and interests at stake. This was the case in the judgment *Goodwin v. the United Kingdom*, where the European Court of Human Rights decided that the interest of the company in knowing who of its employees disclosed the relevant information to the journalist was not sufficient to outweigh the public interest in the non-disclosure, while at the same time the company's interest in limiting the possible negative or even devastating financial consequences of a public dissemination of this information in the media could sufficiently be achieved by an injunction against the publication of this information without having the source disclosed. The European Court of Human Rights held, that "the purpose of the disclosure order was to a very large extent the same as that already being achieved by the injunction, namely to prevent the dissemination of the confidential information (...)" (see, *Goodwin v. the United Kingdom*, para. 42). If such a restriction on the dissemination sufficiently protects the rights and interests of the parties seeking a disclosure, the additional disclosure of the source will not be justified.

34. Therefore, 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.

ii. outweighing legitimate interest

35. With due regard to the established jurisprudence of the European Court of Human Rights, any restriction to Article 10 of the Convention has to be proportionate to the legitimate aim pursued (see, *Goodwin v. the United Kingdom*, 27 March 1996, para. 39). The European Court of Human Rights decided that there must be "a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim" (see, *Goodwin v. the United Kingdom*, para. 46). The concrete interest of the person or public authority in the disclosure of the source must be "sufficient to outweigh the vital public interest in the protection of the (...) journalist's source" (see, *ibid.*, para. 45).

36. Given the importance of freedom of expression and freedom of the media for any democratic society and every individual, and taking into account the potentially chilling effect a source disclosure may have on the readiness of future sources to provide information to journalists, only exceptional cases where a vital personal or public interest is at stake might justify or be proportional to the disclosure of a source. Paragraph *c*, sub-paragraph *ii* refers to this proper use of discretion by the competent authorities and requires that (1) a legitimate interest should outweigh or override the public interest in the non-disclosure and be proven, (2) the vital and serious nature of the circumstances warrants such disclosure and (3) be identified as responding to a pressing social need by the competent authorities; (4) the assessment of the necessity of the disclosure under Article 10 of the European Convention on Human Rights is

subject to supervision and review by the European Court of Human Rights.

37. This Recommendation does not attempt to amend Article 10 of the European Convention on Human Rights. It recommends common standards to be applied by national authorities in member States. From among the grounds mentioned in Article 10, paragraph 2 of the Convention, and with regard to the jurisprudence of the European Court of Human Rights concerning the narrow application of Article 10, paragraph 2 of the Convention, the *Group of Specialists on Media Law and Human Rights* (MM-S-HR) regarded some aims as possibly constituting such legitimate interests where the disclosure of journalists' sources could be justified, subject to meeting the criteria set out in Principle 3.b. Other grounds were deemed to be *prima facie* insufficient to justify a disclosure, though such disclosure might be justified depending on all the circumstances.

38. The public interest in the non-disclosure could, in particular, be outweighed where the disclosure is necessary for "the protection of human life", "the prevention of major crime", or "the defence in the course of legal proceedings of a person who is accused or convicted of having committed a serious crime", subject to meeting the criteria set out in Principle 3.b. The following reasoning was given by the MM-S-HR for its evaluation, taking into account that these cases require an adequate analysis of the particular facts and an appropriate balancing of the fundamental rights under Article 10 and other Articles of the Convention:

protection of human life

39. The protection of human life is the foremost right of human beings, since all other human rights and fundamental freedoms are logically subsequent hereto. The MM-S-HR considered that this pre-eminent position of the protection of human life can justify the disclosure of a journalist's source.

prevention of major crime

40. National criminal law generally distinguishes between offences or minor crimes and "major" or serious crimes. 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.

defence of a person accused or convicted of having committed a major crime

41. Article 6 of the European Convention on Human Rights guarantees in paragraph 1 the right to a fair trial and, in paragraph 3 d, the right to an examination of witnesses against or on the behalf of a person charged with a criminal offence. In the light of this fundamental right, one can imagine cases where the disclosure of a journalist's source could be necessary for the defence of an accused or convicted person in the course of legal proceedings. However, national laws may grant journalists a right not to give evidence in criminal trials, and the Recommendation does not attempt to alter this wider protection. With due regard to the requirement that the disclosure must be limited to exceptional circumstances where vital interests are at stake, the MM-S-HR felt necessary to indicate 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.

c. application to all stages of any proceedings

42. The requirements stipulated in this Principle should be respected and applied by

all public authorities and at all stages of any proceedings where the right of non-disclosure might be invoked by journalists. Such stages may include investigations by the police or prosecutor, court proceedings, parliamentary or political committees of enquiry and other bodies with the power to compel witnesses, as well as review procedures upon appeal or at higher instances.

Principle 4 (Alternative evidence to journalists' sources)

43. In its judgment *De Haes and Gijssels v. Belgium* (24 February 1997, para. 55, 58), 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, because they had refused to prove the truth of the defaming information in question by disclosing their source. This information had, however, been based on statements by court experts in other prior cases. 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 importance of defamation cases for journalists and their work prompted the MM-S-HR to include a respective principle in the Recommendation.

44. In "legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person" through an allegedly false statement of facts, the journalists might be able to establish the truth of their statement by disclosing their source of information.

45. The right of journalists not to disclose their source under this Recommendation implies that the competent authorities should consider all other evidence "which is available to them under national procedural law" instead of requiring journalists to disclose their source. The respective authority may determine whether such evidence is equivalent, taking into account the public interest in the confidentiality of journalists' sources as referred to in this Recommendation. An outright rejection of such alternative evidence could not only be in conflict with the right of journalists not to disclose their sources under Article 10 of the European Convention on Human Rights, but also infringe the right to a fair trial under Article 6 of the Convention. As in the case of *De Haes and Gijssels v. Belgium*, such alternative evidence may, in particular, include information found in other related court or police files accessible to the authority in question.

Principle 5 (Conditions concerning disclosures)

a. direct legitimate interest

46. Principle 3 recommends requirements for a legitimate interest in the disclosure of journalists' sources of information. The far-reaching and deterrent effect of the disclosure of a source also necessitates certain requirements for the initiation of an action by competent authorities aimed at the disclosure of a source. In order to avoid frivolous, arbitrary or unrelated requests or motions for the disclosure, it is recommended in this paragraph that only persons or public authorities that have a "direct legitimate interest in the disclosure" should be entitled to introduce such a request or motion. This requirement should apply to all stages of proceedings which concern journalistic sources.

b. right to be informed

47. Public authorities should avoid situations where journalists might disclose their source of information erroneously for lack of knowledge of their respective right. The fair administration of justice should require that persons before an authority with the power to compel witnesses be informed by this authority of their fundamental procedural or other rights. In accordance with the principles established in this Recommendation, the right of non-disclosure cannot be invoked in an absolute manner. Therefore, journalists should be informed of their right not to disclose their source of information and its possible limitations in accordance with Article 10 of the Convention. Such information has to be given before the disclosure is requested, if it is to be effective.

c. sanctions for non-disclosure

48. The forced disclosure of a journalist's source has a rather severe or "chilling" impact on future sources and the work of journalists, and it must therefore be considered as a rather far-reaching restriction of freedom of information. Article 6, paragraph 1 of the European Convention on Human Rights requires that, "in the determination of his civil rights and obligations (...), everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Paragraph *c* takes account hereof by recommending that any sanction against journalists for not disclosing their source shall only be imposed by judicial authorities in the sense of Article 6 of the Convention. The basis of the imposition of a sanction shall be a court proceeding allowing for a "fair and public hearing" of the journalist concerned. Public scrutiny of such proceedings and sanctions is hereby possible.

d. review of sanctions

49. Paragraph *d* recommends to member States to grant journalists the right to have the imposition of a sanction for not disclosing a source reviewed by another judicial authority. The requirement of the fair administration of justice under Article 6, paragraph 1 of the European Convention on Human Rights does not expressly include the right to a review by a higher instance, while Article 2 of Protocol No. 7 of 22 November 1984 to the Convention lays down this right with respect to convictions or sentences in criminal cases. Any decision by a national authority limiting the right of journalists not to disclose their sources under Article 10 of the Convention falls generally under the possible review by the European Court of Human Rights. The fair and efficient administration of justice at national level might therefore require the possibility of a national review of disclosure orders in general and especially of sanctions for not disclosing information identifying a source.

e. limiting the extent of a disclosure

50. The public nature of court hearings in accordance with Article 6 of the Convention is a fundamental principle of the fair administration of justice. However, in case a competent authority decides in favour of a disclosure of information identifying a source, the negative effects of such a disclosure for the journalist or the source concerned as well as on journalistic work in general should be limited as much as possible. It can therefore be appropriate to exclude the public from all or part of the disclosure by a journalist, in order to avoid that the identity of the source be disclosed publicly and in a context which goes beyond the parties to the disclosure proceeding. As an exception to the principle established under Article 6 of the European Convention on Human Rights, the competent authorities should therefore consider the advisability of excluding the public from the disclosure.

51. The competent authorities should also respect the confidentiality of a disclosure of information identifying a source, for example by not divulging this information themselves.

Principle 6 (Interception of communication, surveillance and judicial search and seizure)

52. This Recommendation sets out standards for the protection of the right of journalists not to disclose their sources. The most direct impact on the confidentiality of sources is the forced disclosure. Besides coercive measures directly aimed at a disclosure, other police or judicial actions might also infringe the confidentiality of the source in an indirect way.

a. exclusion of circumventing measures

53. Principle 6 aims at ensuring that a mere interception order, surveillance order or search and seizure order does not circumvent the protection of journalists' sources recommended herein or be applied in a way which lowers this protection. Principle 6 is therefore a logical corollary to the protection of the right of journalists not to disclose their sources. In accordance with national law, the interception order, surveillance order or search and seizure order could possibly be combined in one decision with the disclosure order which complies with Articles 8 and 10 of the European Convention on Human Rights and the principles of this Recommendation.

54. Interception of communications and correspondence of journalists, their surveillance and search or seizure actions might be ordered by national authorities for other reasons than the disclosure of journalists' sources. These actions are, however, very likely to disclose sources which are in contact with the respective journalist at the time of interception, surveillance or search or seizure. Therefore, the right of journalists not to disclose their source should include the protection of journalists against interceptions of communications, surveillance actions and search or seizure actions, if the purpose of these actions were to circumvent this right. This should not exclude, however, that national authorities may apply measures of interception of communication, surveillance or judicial search and seizure for other lawful reasons in accordance with Articles 8 and 10 of the European Convention on Human Rights.

i. interception of communication

55. In many cases, journalists have to correspond with their sources in writing or by using the telephone, telefax or E-mail or other means of telecommunications. Interception of such communication of journalists or their employers might disclose the identity of a source. The confidentiality of journalist's communications and correspondence is protected by Article 8 as well as Article 10 of the European Convention on Human Rights. Judicial authorities ordering an interception of the communication or correspondence of journalists should limit their interception order so as to maintain the confidentiality of the journalist's source. The actual interception action should also respect the confidentiality. In practice, this might require that any interception be limited to communications or correspondence with other persons than journalistic sources, or special procedures be applied under which information identifying a source be separated from intercepted communications and not be registered.

ii. surveillance

56. Surveillance of journalists must not only comply with the standards of Article 8 of

the Convention, but also with Article 10 with regard to the protection of the right of journalists not to disclose their sources. Police or judicial authorities might keep journalists under surveillance for legal reasons not related to their sources. In such a case, the surveillance order and action should not reveal any information identifying a source. This might be difficult in practice and could require, for instance, the use of special mechanisms of control over the surveillance of journalists, such as the monitoring of the surveillance by another authority which ensures that only such information which does not identify a source be registered or made available by the surveillance action.

iii. judicial search and seizure

57. Journalists' 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, correspondence, archives or personal data of the journalist's employer. Any search or seizure action might reveal information identifying the source.

58. Judicial authorities ordering such search or seizure should limit their search and seizure order with respect to the disclosure of a journalist's source, and judicial or police authorities following such an order should respect the confidentiality of the source in their search and seizure actions in accordance with both, Article 8 and Article 10 of the European Convention on Human Rights. This should require, for example, that the search or seizure be limited to material which does not contain information identifying a source. Practical examples could be the seizure of movable objects but not of information in case of seizure on grounds of pecuniary claims against journalists or the search for illegal objects being limited to these objects without taking note of any information identifying a source.

b. measures against the subsequent use of information

59. Police or judicial authorities might obtain information identifying a source through the actions mentioned in paragraph *a* of Principle 6, although this might not have been the purpose of these actions. In such cases, the right of journalists not to disclose their sources of information should require that "measures should be taken to prevent the subsequent use of this information as evidence before courts". Such measures could be, for example, the destruction of records or pictures identifying the source or the return of seized items.

60. The subsequent use of the information identifying a source should, however, be possible if the disclosure were justified under Principle 3.

Principle 7 (Protection against self-incrimination)

61. This Recommendation sets up a number of principles for the protection or disclosure of journalists' sources of information. As far as the disclosure is concerned, these principles shall not limit other rights of journalists against the provision of information or evidence under national laws, which provide for a higher standard of protection. The disclosure principles established herein are meant for the disclosure of journalists' sources in accordance with Article 10 of the European Convention on Human Rights only. It is a commonly recognised right of witnesses, suspects or persons accused of criminal offences or crimes not to be obliged to give evidence, if this evidence may incriminate them. Principle 7 underlines that, if such right exists, it shall be possible to invoke it separately from the right of journalists not to disclose their sources of information. One can imagine a situation where journalists would be

obliged to disclose their source under Principle 3.b., while Principle 7 could still protect them in case of criminal charges against them.