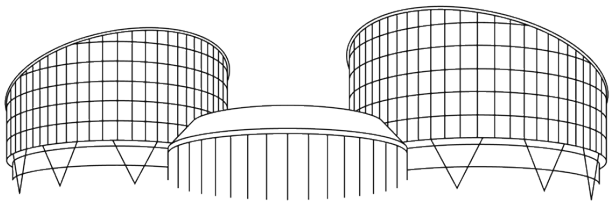

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SANOMA UITGEVERS B.V. v. THE NETHERLANDS

(Application no. 38224/03)

JUDGMENT

STRASBOURG

14 September 2010

This judgment is final but may be subject to editorial revision.

In the case of Sanoma Uitgevers B.V. v. the Netherlands,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President,*
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Karel Jungwiert,
Rait Maruste,
Khanlar Hajiyev,
Egbert Myjer,
Sverre Erik Jebens,
Dragoljub Popović,
Mark Villiger,
Isabelle Berro-Lefèvre,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Mihai Poalelungi, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 6 January and 7 July 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 38224/03) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) incorporated under Netherlands law, Sanoma Uitgevers B.V. ("the applicant company"), on 1 December 2003.

2. The applicant company were represented before the Grand Chamber by Mr O.M.B.J. Volgenant and Mr I.J. de Vré, lawyers practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker of the Ministry for Foreign Affairs.

3. The applicant company alleged, in particular, that their rights under Article 10 of the Convention had been violated as a result of their having been compelled to give up information that would allow sources of journalistic information to be identified.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 23 March 2006 the President of the Third Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3). On 31 March 2009 a Chamber of that Section composed of Josep Casadevall, *President,* Corneliu Bîrsan, Alvina Gyulumyan, Egbert Myjer, Ineta Ziemele, Luis López Guerra, Ann Power, *judges,* and Santiago Quesada, *Section Registrar*, unanimously declared the application admissible and by four votes to three held that there had been no violation of Article 10 of the Convention. A dissenting opinion of Judge Ann Power joined by Judges Alvina Gyulumyan and Ineta Ziemele was appended to the judgment.

5. On 14 September 2009 a panel of the Grand Chamber granted the applicant company's request to refer the case to the Grand Chamber in accordance with Article 43 of the Convention.

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. At the final deliberations, Mihai Poalelungi, substitute judge, replaced Nebojša Vučinić, who was unable to take part in the further consideration of the case (Rule 24 § 3).

7. The applicant company and the Government each filed written observations on the merits. In addition, third-party comments were received from *Media Legal Defence Initiative*, *Committee to Protect Journalists*, *Article 19*, *Guardian News & Media Ltd.* and *Open Society Justice Initiative*, who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 6 January 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr R.A.A. BÖCKER, Ministry for Foreign Affairs, *Agent*,
Ms T. DOPHEIDE, Ministry of Justice,
Ms J. JARIGSMA, Public Prosecution Service, *Advisers*;

(b) *for the applicant company*

Mr O.M.B.J. VOLGENANT, Advocate,
Mr I.J. DE VRÉ, Advocate, *Counsel*,
Mr T. BROEKHUIJSEN, Editor-in-Chief,
Ms F. GLAZENBURG, Assistant Editor-in-Chief,
Mr J. JANSEN, Company Lawyer, *Advisers.*

The Court heard addresses by Mr Volgenant, Mr Broekhuijsen, Mr De Vré and Mr Böcker as well as their answers to questions put by judges.

The Court afterwards invited the applicant company to respond in writing to a statement made at the hearing by the Agent of the Government. The applicant company's response was received on 21 January 2010.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Factual background

1. The applicant company

9. The applicant company is based in Hoofddorp. Its business is publishing and marketing magazines, including the weekly *Autoweek*, which caters for readers who are interested in motoring.

2. The street race

10. On 12 January 2002, an illegal street race was held in an industrial area on the outskirts of the town of Hoorn. Journalists of *Autoweek* attended this race at the invitation of its organisers.

11. The applicant company state that the journalists were given the opportunity to take photographs of the street race and of the participating cars and persons on condition that they guarantee that the identities of all participants would remain undisclosed. The Government, for their part, dispute the existence of any agreement involving more than a small number of organisers or participants at most.

12. The street race was ended by the police, who were present and eventually intervened. No arrests were made.

13. The applicant company intended to publish an article about illegal car races in *Autoweek* no. 7/2002 of 6 February 2002. This article would be accompanied by photographs of the street race held on 12 January 2002. These photographs would be edited in such a manner that the participating cars and persons were unidentifiable, thus guaranteeing the anonymity of the participants in the race. The original photographs were stored by the applicant company on a CD-ROM, which was kept in the editorial office of a different magazine published by the applicant company (not *Autoweek*).

14. The police and prosecuting authorities were afterwards led to suspect that one of the vehicles participating in the street race had been used as a getaway car following a ram raid on 1 February 2001 (see paragraphs 27-29 below).

B. The summons to surrender the CD-ROM, the seizure of the CD-ROM and ensuing proceedings

1. The summons to surrender the CD-ROM and the seizure of the CD-ROM

15. On the morning of Friday 1 February 2002, a police officer contacted the *Autoweek* editorial office by telephone, summoning the editors to surrender to the police all photographic materials concerning the street race of 12 January 2002. This police officer was informed by the staff member whom she had called, namely the features chief editor (*chef reportage*), that this request could not be met as the journalists had only been given permission to take photographs of the street race after having guaranteed the anonymity of the participants in the race. The features chief editor further told this police officer that he thought that the press was reasonably protected against this kind of action and advised her to contact the editorial office in writing.

16. In the afternoon of 1 February 2002, at 2.30 p.m., two police detectives visited the *Autoweek* editorial office and, after having unsuccessfully tried to obtain the surrender of the photographs, issued *Autoweek*'s editor-in-chief with a summons, within the meaning of Article 96a of the Code of Criminal Procedure (*Wetboek van Strafvordering*). This summons had been issued by the Amsterdam public prosecutor; it ordered the applicant company to surrender, in the context of a criminal investigation into offences defined in Articles 310-312 of the Criminal Code (*Wetboek van Strafrecht*) against an unspecified person, the photographs taken on 12 January 2002 during the illegal street race in Hoorn and all related materials. On behalf of the applicant company, *Autoweek*'s editor-in-chief Mr Broekhuijsen refused to surrender the photographs, considering this to be contrary to the undertaking given by the journalists to the street race participants as regards their anonymity.

17. Later that day, a telephone conversation took place between, on the one side, two public prosecutors and, on the other, the lawyer of the applicant company Mr Jansen. Mr Jansen was told by the public prosecutors that "it concerned a matter of life and death". No further explanation was given and Mr Jansen's request for written confirmation that the matter was one of "life and death" was not entertained.

18. The police detectives and the public prosecutors threatened to detain Mr Broekhuijsen during the weekend of 2 to 3 February or even longer for

having acted in violation of Article 184 of the Criminal Code, i.e. the offence of failure to comply with an official order (*ambtelijk bevel*), and to seal and search the whole of the applicant company's premises, if need be for the entire weekend period and beyond, and remove all computers. The threatened search would entail financial damage for the applicant company as, during that weekend, articles were to be prepared for publication on the subject of the wedding of the Netherlands Crown Prince, due to take place on 2 February 2002.

19. At 6.01 p.m. on 1 February 2002, Mr Broekhuijsen was arrested on suspicion of having violated Article 184 of the Criminal Code. He was not taken to the police station but remained on the applicant company's premises. After the Amsterdam public prosecutor had arrived on these premises and after he had been brought before the prosecutor, Mr Broekhuijsen was released at 10 p.m.

20. The applicant company then consulted their counsel, Mr S., and a second lawyer, Mr D., the latter being a specialist in criminal procedure. At some point the CD-ROM was transferred to the lawyers' offices unbeknown to the public prosecutor and the police investigators. Upon this, the public prosecutor and the other persons involved went to the lawyers' offices.

21. Mr D. spoke with the public prosecutors involved for some two hours, from 11.15 p.m. onwards. Taking the view that judicial authorisation was required, he sought and obtained the agreement of the public prosecutors to seek the intervention of the duty investigating judge (*rechter-commissaris*) of the Amsterdam Regional Court (*rechtbank*), who was then contacted by telephone. After having spoken with Mr D., and after having been briefed by one of the public prosecutors, the investigating judge expressed the view that the needs of the criminal investigation outweighed the applicant company's journalistic privilege. While recognising from the outset that by law he lacked competence in the matter, he also stated that, had he had the power to do so, he would have been prepared to give an order to that effect and even to sanction a search of the offices.

22. On 2 February 2002 at 1.20 a.m., the applicant company, through Mr S. and Mr D. and under protest, surrendered the CD-ROM containing the photographs to the public prosecutor, who formally seized it. An official receipt issued by a police officer describes it as a CD-ROM in purpose-made packaging, the packaging labelled in handwriting "Photos Illegal Street Races, ANWB [Royal Netherlands Tourist Association] driving simulator, sidecar motorcycle with coffin". The receipt stated that Mr S. had handed over the CD-ROM under protest.

2. Proceedings in the Regional Court

23. On 15 April 2002 the applicant company lodged a complaint under Article 552a of the Code of Criminal Procedure, seeking the lifting of the seizure and restitution of the CD-ROM, an order to the police and

prosecution department to destroy copies of the data recorded on the CD-ROM and an injunction preventing the police and prosecution department from taking cognisance or making use of information obtained through the CD-ROM.

24. On 5 September 2002 a hearing was held before the Regional Court during which the public prosecutor explained why the surrender of the photographs had been found necessary. The summons complained of had been issued in the context of a criminal investigation concerning serious criminals who had pulled cash dispensers out of walls with the aid of a shovel loader, and there was reason to believe that a car used by participants in the street race could lead to the perpetrator(s) of those robberies.

25. In its decision of 19 September 2002 the Regional Court granted the request to lift the seizure and to return the CD-ROM to the applicant company as the interests of the investigation did not oppose this. It rejected the remainder of the applicant company's complaint. It found the seizure lawful and, on this point, considered that a publisher/journalist could not, as such, be regarded as enjoying the privilege of non-disclosure (*verschoningsrecht*) under Article 96a of the Code of Criminal Procedure. Statutorily, the persons referred to in Article 218 of the Code of Criminal Procedure and acknowledged as enjoying the privilege of non-disclosure were, amongst others, public notaries, lawyers and doctors. It considered that the right to freedom of expression, as guaranteed by Article 10 of the Convention, included the right freely to gather news (*recht van vrije nieuwsgaring*) which, consequently, deserved protection unless outweighed by another interest warranting priority. It found that, in the instant case, the criminal investigation interest outweighed the right to free gathering of news in that, as explained by the public prosecutor during the hearing, the investigation at issue did not concern the illegal street race, in which context the undertaking of protection of sources had been given, but an investigation into other serious offences. The Regional Court was therefore of the opinion that the case at hand concerned a situation in which the protection of journalistic sources should yield to general investigation interests, the more so as the undertaking to the journalistic source concerned the street race whereas the investigation did not concern that race. It found established that the data stored on the CD-ROM had been used for the investigation of serious offences and that it had been made clear by the prosecutor that these data were relevant to the investigation at issue as all other investigation avenues had led to nothing. It therefore concluded that the principles of proportionality and subsidiarity had been complied with and that the interference had thus been justified. The Regional Court did not find that the seizure had been rash, although more tactful action on the part of the police and the public prosecutor might have prevented the apparent escalation of the matter.

3. Proceedings in the Supreme Court

26. The applicant company lodged an appeal on points of law with the Supreme Court (*Hoge Raad*), which on 3 June 2003 gave a decision declaring it inadmissible. The Supreme Court held that, as the Regional Court had accepted the applicant company's complaint in so far as it related to the request to lift the seizure and to return the CD-ROM, the applicant company no longer had an interest in its appeal against the ruling of 19 September 2002. Referring to its earlier case-law (Supreme Court, 4 October 1988, *Nederlandse Jurisprudentie* (Netherlands Law Reports – "NJ") 1989, no. 429, and Supreme Court, 9 January 1990, NJ 1990, no. 369), it held that this finding was not altered by the circumstance that the complaint – apart from a request to return the CD-ROM – also contained a request to order that any print-outs or copies of the CD-ROM were to be destroyed and that data collected with the aid of the CD-ROM could not be used: neither Article 552a nor any other provision of the Code of Criminal Procedure provided for the possibility of obtaining a declaratory ruling that the seizure or the use of the seized item was unlawful once the item had been returned.

C. Factual information submitted to the Court by the Government

27. The order issued under Article 96a of the Code of Criminal Procedure was closely related to a criminal investigation into a series of ram raids which had taken place on 20 September 2001, 6 November 2001 and 30 November 2001. In these ram raids, cash dispensers were removed from walls using a shovel loader. A group of suspects was identified, the main suspects being A and M.

28. A telephone conversation involving M, tapped in the context of the investigation into those raids on 12 January 2002, revealed that M and A had participated in an illegal street race in Hoorn with an Audi RS4 motor car earlier that day.

29. On 1 February 2002 another ram raid took place. During the incident, a bystander was threatened with a firearm. After ramming a wall, the perpetrators removed a cash dispenser and hauled it off in a lorry, which was followed closely by an Audi RS4. The police, who had already been informed of the incident, saw the lorry stop and the driver get into an Audi, which then drove away with three people inside. The police followed, but the Audi accelerated to over 200 kilometres per hour and disappeared from view.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. The Code of Criminal Procedure

1. Article 96a of the Code of Criminal Procedure

30. Article 96a of the Code of Criminal Procedure reads as follows:

> "1. If it is suspected that a crime within the meaning of Article 67 § 1 has been committed, the investigating officer may order a person to surrender an object if it is reasonable to suspect that the person has an object subject to seizure in his possession.
>
> 2. The order shall not be issued to the suspect.
>
> 3. By virtue of their right to decline to give evidence, the following persons are not obliged to comply with an order of this nature:
>
> a. the persons described in Article 217;
>
> b. the persons described in Article 218, insofar as surrender for seizure would violate their duty of confidentiality;
>
> c. the persons referred to in Article 219, insofar as surrender for seizure would put them or their relatives at risk of prosecution for a criminal offence. ..."

31. Article 67 § 1 of the Code of Criminal Procedure lists the offences in respect of which detention on remand may be ordered. These include, among others, the offences defined in Articles 310-312 of the Criminal Code (theft, theft under aggravating circumstances, and robbery).

32. A failure to comply with an order under Article 96a constitutes an offence as defined in, as relevant to the case, Article 184 (failure to comply with an official order) of the Criminal Code. This is an indictable offence (*misdrijf*) carrying a three-month maximum prison sentence or a fine.

33. Persons who, by virtue of Articles 217-219 of the Code of Criminal Procedure, enjoy the privilege of non-disclosure include

a. an accused's relatives, (former) spouse and (former) registered partner (Article 217);

b. persons who, by virtue of their position, profession or office, are bound to secrecy – albeit that their privilege of non-disclosure only covers matters the knowledge of which has been entrusted to them in that capacity (Article 218; this category is traditionally considered to include doctors, advocates, clergy and notaries); and

c. persons who, by giving evidence, expose themselves, their relatives to the second or third degree, their (former) spouse or their (former) registered partner to the risk of a criminal conviction (Article 219).

34. Article 96a of the Code of Criminal Procedure entered into force on 1 February 2000. Prior to this date, only the investigating judge was competent to issue an order to surrender for the purposes of seizure (former Article 105 of the Code of Criminal Procedure).

2. Article 552a of the Code of Criminal Procedure

35. Article 552a of the Code of Criminal Procedure reads as follows:

> "1. Interested parties may lodge a written complaint about seizure, the use of seized objects, the failure to order the return, or the examination (*kennisneming*) or use of information recorded by means of an automatised device and recorded during a house search, and about the examination or use of information as referred to in Articles 100,101, 114, 125i and 125j [i.e. letters and parcels sent by post, Articles 100, 101 and 114; electronic data, such as internet traffic, recorded by a third party, Articles 125i and 125j].
>
> 2. The written complaint shall be lodged as soon as possible after the seizure of the object or the examination of the information at the registry of the trial court before which the case is being prosecuted or was last prosecuted. The written complaint shall not be admissible if it is lodged at a time when more than three months have passed since the case prosecuted has been brought to a close.
>
> ...
>
> 5. The hearing in chambers (*raadkamer*) to examine the written complaint shall be public.
>
> 6. If the court considers the complaint to be well-founded, it shall give the appropriate order."

B. Domestic case-law

36. Until 11 November 1977, the Netherlands Supreme Court did not recognise a journalistic privilege of non-disclosure. On that date, it handed down a judgment in which it found that a journalist, when asked as a witness to disclose his source, was obliged to do so unless it could be regarded as justified, in the particular circumstances of the case, that the interest of non-disclosure of a source outweighed the interest served by such disclosure. This principle was overturned by the Supreme Court in a landmark judgment of 10 May 1996 on the basis of the principles set out in the Court's judgment of 27 March 1996 in the case of *Goodwin v. the United Kingdom* (*Reports of Judgments and Decisions* 1996-II). In this ruling, the Supreme Court accepted that, pursuant to Article 10 of the Convention, a journalist was in principle entitled to non-disclosure of an information source unless, on the basis of arguments to be presented by the party seeking disclosure of a source, the judge was satisfied that such disclosure was necessary in a democratic society for one or more of the

legitimate aims set out in Article 10 § 2 of the Convention (*Nederlandse Jurisprudentie* (Netherlands Law Reports, "NJ") 1996, no. 578).

C. Official instructions

37. Guidelines on the position of the press in relation to police action (*Leidraad over de positie van de pers bij politieoptreden*) were issued by the Minister of Justice (*Minister van Justitie*) on 19 May 1988. At the time of the events complained of, they provided, in relevant part:

> "7. Seizure of journalistic material
>
> Journalistic material may be seized in cases described in the Code of Criminal Procedure. Journalists may be faced with seizure in two ways.
>
> A. The police may, on the instructions of a public prosecutor (*officier van justitie*) or an assistant public prosecutor (*hulpofficier van justitie*) or not as the case may be, arrest a journalist on suspicion of a criminal act and seize everything he has with him on the spot.
>
> There must then be a direct connection between a particular criminal act and the journalistic material with which that act has been committed. In this situation, the journalist is arrested like any ordinary citizen.
>
> If a prosecution ensues, it will be for the independent judge eventually to decide what is to be done with any seized – and unpublished – material.
>
> B. Journalistic material may also be seized on the orders of an independent judge (the investigating judge), if such material may – in the judge's opinion – serve to clarify the truth in a preliminary judicial investigation (*gerechtelijk vooronderzoek*).
>
> ..."

D. Developments in domestic law

1. Developments predating the events

38. On 4 December 2000, the boards of the Netherlands Society of Editors-in-Chief (*Nederlands Genootschap van Hoofdredacteuren*) and the Netherlands Union of Journalists (*Nederlandse Vereniging van Journalisten*) set up a commission to investigate and take stock of problems arising in relation to the protection of journalistic sources and seizure of journalistic materials. This commission – which was composed of a professor of criminal law, the secretary of the Netherlands Union of Journalists, a Regional Court judge and an editor of a national daily newspaper – concluded in its report of 30 October 2001, *inter alia*, that specific legislation was not necessary and that by way of making certain

procedural changes – such as a preliminary assessment procedure, where it concerned the application of coercive measures in cases where the protection of sources was in issue – a number of problem areas could be resolved.

39. Already in 1993, Mr E. Jurgens – at the time a member of the Netherlands Lower House of Parliament (*Tweede Kamer*) – had submitted a private member's bill (*initiatiefwetsvoorstel*) to amend the Code of Criminal Procedure and the Code of Civil Procedure in order to secure the protection of journalistic sources and the protection of journalists as regards disclosing information held by them. On 2 March 2005, after remaining dormant, this bill was eventually withdrawn without having been taken up in parliament.

2. Developments post-dating the events

a. Official instructions

40. On 15 January 2002, in the light of the case-law developments in this area and Recommendation No. R(2000) 7 adopted by the Committee of Ministers of the Council of Europe on 8 March 2000 (see below), the Board of Procurators General (*College van procureurs-generaal*) adopted an Instruction within the meaning of Article 130 § 4 of the Judiciary (Organisation) Act (*Wet op de Rechterlijke Organisatie*) on the application by the Public Prosecution Department of coercive measure in respect of journalists (*Aanwijzing toepassing dwangmiddelen bij journalisten*; published in the Official Gazette (*Staatscourant*) 2002, no. 46), which entered into force on 1 April 2002 for a period of four years. This Instruction defines who is to be considered as a "journalist" and sets out the pertinent principles and guidelines as regards the application of coercive measures, such as *inter alia* an order under Article 96a of the CCP, in respect of a journalist.

b. Case-law development

41. In a judgment given on 2 September 2005 concerning the search of premises of a publishing company on 3 May 1996 (*Landelijk Jurisprudentie Nummer* [National Jurisprudence Number] LJN AS6926), the Supreme Court held *inter alia*:

> "The right of freedom of expression, as set out in Article 10 of the Convention, encompasses also the right to freely gather news (see, amongst others, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, NJ 1996, no. 577; and *Roemen and Schmit v. Luxembourg*, judgment of 25 February 2003 [ECHR 2003-IV]). An interference with the right to freely gather news – including the interest of protection of a journalistic source – can be justified under Article 10 § 2 in so far as the conditions set out in that provision have been complied with. That means in the first place that the interference must have a basis in national law and that those national legal rules must have a certain precision. Secondly, the interference must serve one of the aims mentioned in Article 10 § 2. Thirdly, the interference must be necessary in a

democratic society for attaining such an aim. In this, the principles of subsidiarity and proportionality play a role. In that framework it must be weighed whether the interference is necessary to serve the interest involved and therefore whether no other, less far-reaching ways (*minder bezwarende wegen*) can be followed along which this interest can be served to a sufficient degree. Where it concerns a criminal investigation, it must be considered whether the interference with the right to freely gather news is proportionate to the interest served in arriving at the truth. In that last consideration, the gravity of the offences under investigation will play a role."

3. Proposed legislation

42. The Court's judgment in the *Voskuil* case (*Voskuil v. the Netherlands*, no. 64752/01, 22 November 2007) has prompted the Government to introduce new legislation. A bill now pending before Parliament proposes to add a new Article to the Code of Criminal Procedure (Article 218a) that would explicitly allow "witnesses to whom information has been entrusted within the framework of the professional dissemination of news (*beroepsmatige berichtgeving*) or the gathering of information for that purpose, or the dissemination of news within the framework of participation in the public debate, as the case may be" – that is, professional journalists in particular – to refuse to give evidence or identify sources of information. Such a right would be more limited than that enjoyed by the categories enumerated in Articles 217, 218 and 219 of the Code of Criminal Procedure; it would be subject to the finding of the investigating judge that no disproportionate harm to an overriding public interest (*zwaarderwegend maatschappelijk belang*) would result from such refusal. However, persons covered by the proposed new Article 218a would not be among those entitled to refuse outright to surrender items eligible for seizure: the bill proposes to include them in the enumeration contained in Article 96a § 3 (paragraph 30 above).

E. Relevant international materials

43. Several international instruments concern the protection of journalistic sources, among others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and the Resolution on the Confidentiality of Journalists' Sources by the European Parliament (18 January 1994, Official Journal of the European Communities No. C 44/34).

44. Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information was adopted by the Committee of Ministers of the Council of Europe on 8 March 2000 and states, in so far as relevant:

"[The Committee of Ministers] Recommends to the governments of member States:

1. to implement in their domestic law and practice the principles appended to this recommendation,

2. to disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and

3. 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.

Appendix to Recommendation No. R (2000) 7

Principles concerning the right of journalists not to disclose their sources of information

Definitions

For the purposes of this Recommendation:

a. the term 'journalist' means 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 mass communication;

b. the term 'information' means any statement of fact, opinion or idea in the form of text, sound and/or picture;

c. the term 'source' means any person who provides information to a journalist;

d. the term 'information identifying a source' means, as far as this is likely to lead to the identification of a source:

i. the name and personal data as well as voice and image of a source,

ii. the factual circumstances of acquiring information from a source by a journalist,

iii. the unpublished content of the information provided by a source to a journalist, and

iv. personal data of journalists and their employers related to their professional work.

Principle 1 (Right of non-disclosure of journalists)

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 for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) and the principles established herein, which are to be considered as minimum standards for the respect of this right.

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

Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.

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

a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10 § 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10 § 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph b, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

b. The disclosure of information identifying a source should not be deemed necessary unless 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 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.

c. The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

Principle 4 (Alternative evidence to journalists' sources)

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.

Principle 5 (Conditions concerning disclosures)

a. The motion or request for initiating any action by competent authorities aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.

b. 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 a disclosure is requested.

c. 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 Convention.

d. Journalists should have the right to have the imposition of a sanction for not disclosing their information identifying a source reviewed by another judicial authority.

e. Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure.

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

a. The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, 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.

b. Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

Principle 7 (Protection against self-incrimination)

The principles established herein shall not in any way limit national laws on the protection against self-incrimination in criminal proceedings, and journalists should,

as far as such laws apply, enjoy such protection with regard to the disclosure of information identifying a source."

For the precise application of the Recommendation, the explanatory notes specified the meaning of certain terms. As regards the term "sources" the following was set out:

"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, Eur. 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."

F. Information submitted by the intervening third parties

45. *Media Legal Defence Initiative*, *Committee to Protect Journalists*, *Article 19*, *Guardian News & Media Ltd.* and *Open Society Justice Initiative*, who were given leave by the President to intervene in the written procedure, submitted *inter alia* the following comparative-law information (footnote references omitted):

"Echoing the *Goodwin* Court's scrutiny of review procedures and the Committee of Ministers' recommendation that non-disclosure of sources be sanctionable only under 'judicial authorit[y]' (Rec. No. R(2000)7, Principle 5(c)), many national laws state that only courts may compel disclosure of information identifying confidential sources. The following can be taken as typical examples of legislation to this effect:

- Law on Radio and Television Broadcasting, Art. 7 (Romania), July 11, 2002, Law No. 504 (revisions in force 3 December 2008) (*Legii audiovizualului*) (only law courts may compel disclosure of a journalist's confidential sources);

- Media Act (Croatia), Art. 30, 5 May 2004, Official Gazette No. 59/2004 (*Zakon o medijima*) (similar);

- Code of Criminal Procedure, Art. 180 (Poland), 6 June 1997, Law No. 97.89.555 (*Kodeks Postepowania Karnego*) (right to keep sources confidential is a testimonial privilege);

- Law of the Republic of Armenia on the Dissemination of Mass Information, Art. 5, 13 December 2003, (...) (disclosure may be compelled only by a 'court decision, in the course of a criminal proceeding' of certain serious crimes);

- Radio and Television Law, Section 15 (Bulgaria), 23 November 1998, Decree No. 406 (as amended June 2009) (*Закон за радиото и телевизията*) (allowing for disclosure only in 'pending court proceedings or a pending proceeding instituted on an appeal from an affected person' where court issues appropriate order).

Courts have stressed the same. The Lithuanian constitutional court, investigating the compatibility of that country's sources laws with the standards set by the European Court of Human Rights, has held that 'the legislator ... has a duty to establish, by law, also that in every case it is only the court that can decide whether the journalist must disclose the source of information.'

In Germany, search and seizure warrants may be issued only by a judge. Only when there is imminent risk may a prosecutor order such a search. The authorising judge or prosecutor must always consider the impact of the proposed action on press freedom; and whether a search or seizure has been ordered by a judge or by a prosecutor, *ex post facto* judicial review must always be available.

In the United States, prior judicial review of efforts to compel information from journalists is a baseline requirement. In nearly all circumstances, law enforcement authorities must issue a subpoena to try to compel journalists to turn over information, which the journalists may then challenge in court before providing the information. In the very limited circumstances where police may proceed by search warrant (as stated above, these include probable cause to believe the possessor of the information 'has committed or is committing the criminal offense to which the materials relate', or that the search or seizure is 'necessary to prevent death or serious injury') a judge must issue the warrant."

THE LAW

I. SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

46. In their request for referral to the Grand Chamber and again in their written observations on the merits, in addition to restating their complaint under Article 10 of the Convention the applicant company alleged a violation of Article 13 in that there had been no effective prior judicial control and in that the Supreme Court, by dismissing the applicant company's appeal on points of law as having become devoid of interest, had deprived an appeal on points of law of its effectiveness as a remedy. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government's Agent, speaking at the hearing, asked the Court to dismiss the applicant company's complaints under this Article as being outside the scope of the case.

47. The Court reiterates that in the context of Article 43 § 3 the "case" referred to the Grand Chamber embraces those aspects of the application that have been declared admissible by the Chamber (see, among other authorities, *K. and T. v. Finland* [GC], no. 25702/94, § 141, ECHR 2001-VII; and *Šilih v. Slovenia* [GC], no. 71463/01, § 120, 9 April 2009) and those only (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 124, ECHR 2008-...; and *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, § 194, ECHR 2008-...).

48. The complaints under Article 13 are new ones, made for the first time before the Grand Chamber. They are thus not included in the Chamber's decision on admissibility. It follows that the Court cannot now consider them.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

49. The applicant company complained that they had been compelled to disclose information to the police that would have enabled their journalists' sources to have been revealed in violation of their right to receive and impart information, as guaranteed by Article 10 of the Convention. This provision provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Government denied that there had been any such violation.

A. General considerations

50. Freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216) 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.

51. 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 (*Goodwin v. the United Kingdom*, cited above, § 39; *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 46, ECHR 2003-IV; *Voskuil v. the Netherlands*, cited above, § 65).

B. Whether there has been an "interference" with a right guaranteed by Article 10

1. The Chamber's judgment

52. The Chamber accepted that at the time when the CD-ROM was handed over the information stored on it had only been known to the applicant company and not yet to the public prosecutor and the police. It followed, in the Chamber's assessment, that the applicant company's rights under Article 10 as a purveyor of information had been made subject to an interference in the form of a "restriction" and that Article 10 was applicable (see the Chamber's judgment, § 50).

2. Arguments before the Court

a. The Government

53. The Government asked the Court not to accept as fact that the applicant company, or their journalists as the case might be, had actually promised to render the participants in the street race and their cars unrecognisable in any photographs to be published in order to secure their anonymity. Nothing was known of the persons with whom such an agreement had purportedly been reached and what exactly its content might have been. At all events, given the sheer number of persons participating, it seemed unlikely that an agreement of any description had been negotiated with every single one of them.

54. The Government also pointed to the fact that the street race, though illegal, had taken place in full public view. That being so, and relying on *British Broadcasting Corporation v. the United Kingdom*, no. 25794/94, Commission decision of 18 January 1996, they argued that the applicant company could not possibly be under any duty of confidentiality or secrecy.

55. Assuming there nonetheless to be a source deserving of protection, the Government argued in the alternative that the agreement of confidentiality, if agreement there were, could relate only to the street race. Pursuing that hypothesis, the Government accepted as plausible that the sources might have demanded confidentiality to avoid being prosecuted for taking part in the race. However, the order to surrender the photographs had been given in an entirely different context; it had never been the intention of the public prosecutor or the police to identify the sources themselves in connection with their participation in the illegal street race. Nor indeed had any prosecutions been brought related to the street race, not even against A and M.

b. The applicant company

56. The applicant company replied that they could not realistically have been required to produce a written agreement. Their journalists had stated that in order to be allowed to take pictures, they had had to promise the organisers of the street race – who were acting on behalf of all participants – in advance that the identity of participants would not be revealed in any way.

57. The applicant company countered that the location of the street race was irrelevant. The police or other third parties would not have had unrestricted access to the events; moreover, the fact that the street race took place on the public highway did not alter the fact that the applicant company's journalists had bound themselves not to disclose the identity of any participants. They dismissed as incorrect the distinction made in the Chamber's judgment between the identification of journalistic sources and the compulsory handover of journalistic material capable of identifying sources.

c. The intervening third parties

58. The intervening third parties noted that there were photographs taken by the journalists of the illegal street race from which any or all of the participants could be identified once the photographs were in the hands of the authorities.

3. The Court's case-law

59. In its earlier case-law the Court has found various acts of the authorities compelling journalists to give up their privilege and provide

information on their sources or to obtain access to journalistic information to constitute interferences with journalistic freedom of expression. Thus, in *Goodwin v. the United Kingdom*, cited above, the Court held a disclosure order requiring a journalist to reveal the identity of a person who had provided him with information on an unattributable basis, and the fine imposed upon him for having refused to do so, to constitute an interference with the applicant's right to freedom of expression as guaranteed by paragraph 1 of Article 10.

60. In the *British Broadcasting Corporation* decision referred to by the Government (paragraph 54 above), the Commission distinguished the case of *Goodwin v. the United Kingdom* case on the grounds that Mr Goodwin had received information on a confidential and unattributable basis, whereas the information which the BBC had obtained comprised recordings of events that had taken place in public and to which no particular secrecy or duty of confidentiality could possibly attach". The Court notes that nothwithstanding this finding the Commission "assume[d] an interference with the BBC's Article 10 rights in the case".

61. In *Roemen and Schmit v. Luxembourg*, cited above, § 47; *Ernst and Others v. Belgium*, no. 33400/96, § 94, 15 July 2003; and again in *Tillack v. Belgium*, no. 20477/05, § 56, ECHR 2007-XIII, the Court found that searches of journalists' homes and workplaces seeking to identify civil servants who had provided the journalists with confidential information constituted interferences with their rights guaranteed by paragraph 1 of Article 10. In *Roemen and Schmit*, *loc. cit.*, the Court also pointed out that the fact that the searches proved unproductive did not deprive them of their purpose, namely to establish the identity of the journalist's source.

62. In *Voskuil v. the Netherlands*, cited above, § 49, an interference with the applicant's rights under Article 10 of the Convention was found in that a journalist's refusal to name the person who had presented him with information on alleged wrongdoing by police officers in a criminal investigation led the domestic court to order his detention in an attempt to compel him to speak.

63. Most recently, in *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, § 56, 15 December 2009, the Court found an order for the disclosure of the identity of an anonymous source of information addressed to four newspaper publishers and a news agency to constitute an interference with their rights under Article 10. Even though the order had not been enforced, that did not remove the harm to the applicant company since, however unlikely such a course of action might appear by the time the Court delivered its judgment, the order remained capable of being enforced.

4. Application of the case-law principles to the facts of the case

64. Turning to the present case, the Court is of the view that although the question has been the subject of much debate between the parties, it is not

necessary to determine whether there actually existed an agreement binding the applicant company to confidentiality. The Court agrees with the applicant company that there is no need to require evidence of the existence of a confidentiality agreement beyond their claim that such an agreement existed. Like the Chamber, the Court sees no reason to disbelieve the applicant company's claim that a promise had been made to protect the cars and their owners from being identified.

65. As the Government correctly state, in the present case the authorities did not require the applicant company to disclose information for the purposes of the identification of the street race participants, but only to surrender photographs which in the applicant company's submission might, upon examination, lead to their identification. However, in *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, ECHR 2005-XIII the Court held that the decision of the Danish Supreme Court to compel the applicant company to hand over unedited footage constituted an interference within the meaning of Article 10 § 1 of the Convention despite the finding that the affected persons were not to be considered "anonymous sources of information" within the meaning of the case-law of the Court (paragraphs 59 and 61 above). In its decision the Court accepted the possibility that Article 10 of the Convention might be applicable in such a situation and found that a compulsory handover of research material might have a chilling effect on the exercise of journalistic freedom of expression.

66. The Court further notes that in the present case the order concerned was not intended to identify the sources themselves in connection with their participation in the illegal street race and that indeed, no prosecution had been brought in relation to this race or even against A. and M., who were suspected of having committed grave crimes. The Court, however, does not consider this distinction to be crucial.

67. In earlier case-law the Court has considered the extent to which the acts of compulsion resulted in the actual disclosure or prosecution of journalistic sources irrelevant for the purposes of determining whether there has been an interference with the right of journalists to protect them. In the case of *Roemen and Schmit*, the information sought was not obtained as a result of the execution of the order for search and seizure in the journalist's workplace. This order was considered "a more drastic measure than an order to divulge the source's identity... because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. It thus considers that the searches of the first applicant's home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*" (*loc. cit.*, § 57).

68. As previously observed, in the case of *Financial Times Ltd and Others v. the United Kingdom*, cited above, § 56, the fact that the disclosure

order had not actually been enforced against the applicant company did not prevent the Court from finding that there had been an interference (see paragraph 63 above).

69. The Court observes, as the Chamber did, that unlike in other comparable cases – *Ernst and Others v. Belgium*, cited above; *Roemen and Schmit v. Luxembourg*, cited above; *Tillack v. Belgium*, cited above – there was no search of the applicant company's premises. However the public prosecutor and the police investigators clearly indicated their intention to carry out such a search unless the editors of *Autoweek* bowed to their will (see paragraph 18 above).

70. This threat – accompanied as it was by the arrest, for a brief period, of a journalist – was plainly a credible one; the Court must take it as seriously as it would have taken the authorities' actions had the threat been carried out. Not only the offices of *Autoweek* magazine's editors but those of other magazines published by the applicant company would have been exposed to a search which would have caused their offices to be closed down for a significant time; this might well have resulted in the magazines concerned being published correspondingly late, by which time news of current events (see paragraph 18 above) would have been stale. News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (see, for example, Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 60, Series A no. 216; Sunday Times *v. the United Kingdom (no. 2)*, judgment of 26 November 1991, Series A no. 217, § 51; and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII). This danger, it should be observed, is not limited to publications or periodicals that deal with issues of current affairs (cf. *Alınak v. Turkey*, no. 40287/98, § 37, 29 March 2005).

71. While it is true that no search or seizure took place in the present case, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources (*mutatis mutandis*, *Financial Times Ltd and Others v. the United Kingdom*, cited above, § 70).

72. In sum, the Court considers that the present case concerns an order for the compulsory surrender of journalistic material which contained information capable of identifying journalistic sources. This suffices for the Court to find that this order constitutes, in itself, an interference with the applicant company's freedom to receive and impart information under Article 10 § 1.

C. Whether the interference was "prescribed by law"

1. The Chamber's judgment

73. The Chamber was satisfied 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 (§§ 51-52 of the Chamber's judgment).

2. Arguments before the Court

74. All agree that a statutory basis for the interference complained of existed in domestic law, namely Article 96a of the Code of Criminal Procedure.

75. The applicant company contended that the law in force lacked foreseeability. Article 96a of the Code of Criminal Procedure gave the public prosecutor and the police an unfettered discretion to determine whether to order the surrender of information, without any limits as to the grounds on which to do so or the methods to be used. In particular, it was entirely silent on the subject of interferences with the journalistic privilege of source protection.

76. Although admittedly Government or other official directives addressed to subordinate authorities might be taken into account in assessing foreseeability, in the present case such directives had not been available. An official instruction issued by the Board of Procurators General had entered into force only on 1 April 2002, that is two months after the events complained of.

77. The absence of a statutory requirement of judicial control constituted, in the applicant company's view, a separate violation of the requirement of legality. They pointed to Principle 3(a) of Recommendation No. R(2000) 7 of the Committee of Ministers of the Council of Europe (see paragraph 44 above), according to which "competent authorities" should assess the need for disclosure. They asked the Grand Chamber to clarify the duties of the State in this respect.

78. They also took issue with the Chamber's finding that the intervention of the investigating judge had been sufficient in the instant case to satisfy the requirements of Article 10. In general, the unregulated involvement of an investigating judge could not make up for the lack of a statutory guarantee.

79. The Government argued that Article 96a of the Code of Criminal Procedure satisfied the requirements of foreseeability and accessibility. In defining the groups entitled to specific protection, the third paragraph of that Article referred to other Articles of that Code, namely Articles 217, 218 and 219, none of which mentioned journalists. Moreover, guidance as to the interpretation of that provision was to be found in its drafting history and in a policy rule accessible to the public.

80. The intervening third parties in their observations (see paragraph 45 above) noted a tendency in countries in Europe and elsewhere towards the introduction of safeguards, by statute and case-law both. They cited examples of States that had made interferences with the protection of journalistic sources subject to prior judicial authorisation; in some of the jurisdictions named, though not all, the police could exceptionally proceed with a search in certain circumscribed cases of particular urgency. Some jurisdictions provided for review *post factum*, in certain cases even if source disclosure had been ordered *ante factum* by a judge.

3. The Court's assessment

a. Applicable principles

81. The Court reiterates its settled case-law according to which the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be both adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct.

82. For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise (see, among many other authorities, the Sunday Times *v. the United Kingdom (no. 1)* judgment of 26 April 1979, Series A no. 30, § 49; *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 37, Series A no. 316-B; *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI; and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I).

83. Further, as regards the words "in accordance with the law" and "prescribed by law" which appear in Articles 8 to 11 of the Convention, the

Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. "Law" must be understood to include both statutory law and judge-made "law". In sum, the "law" is the provision in force as the competent courts have interpreted it (*Leyla Şahin v. Turkey* [GC], no. 44774/98, § 88, ECHR 2005-XI, with further references).

b. Application of these principles

i. Basis in domestic law

84. The Supreme Court's judgment of 10 May 1996 (NJ 1996, no. 578) recognised in principle a journalistic privilege of source protection in terms derived from the Court's *Goodwin v. the United Kingdom* judgment, delivered shortly before.

85. At the time of the events complained of, the official instruction issued by the Minister of Justice on 19 May 1988 (paragraph 37 above) was apparently still valid.

86. The Court accepts, as indeed do the parties, that Article 96a of the Code of Criminal Procedure provided the statutory basis for the interference here at issue.

87. There is no question of the above legal materials being insufficiently accessible.

ii. Quality of the law

88. Given the vital importance to press freedom of the protection of journalistic sources and of information that could lead to their identification any interference with the right to protection of such sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake.

89. The Court notes that orders to disclose sources potentially have a detrimental impact, not only on the source, whose identity may be revealed, but also on the newspaper or other publication against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who have an interest in receiving information imparted through anonymous sources (see, *mutatis mutandis*, *Voskuil v. the Netherlands*, cited above, § 71).

90. First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. The principle that in cases concerning protection of journalistic sources "the full picture should be before the court" was highlighted in one of the earliest cases of this nature to be considered by the Convention bodies (*British*

Broadcasting Corporation, quoted above (see paragraph 54 above)). 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.

91. The Court 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, 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.

92. 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 (see, for example, *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, cited above). 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 (see, *mutatis mutandis*, *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, §§ 62-66, ECHR 2007-XI).

93. In the Netherlands, since the entry into force of Article 96a of the Code of Criminal Procedure this decision is entrusted to the public prosecutor rather than to an independent judge. 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.

94. According to the guideline of 19 May 1988, under B (see paragraph 37 above), the lawful seizure of journalistic materials required the opening of a preliminary judicial investigation and an order of an investigating judge. However, following the transfer of the power to issue surrender orders to the public prosecutor under Article 96a of the Code of Criminal Procedure, this guideline no longer served as a guarantee of independent scrutiny. As regards the quality of the law, it is therefore of no pertinence to the case before the Court.

95. It is true, nonetheless, that the applicant company asked for the intervention of the investigating judge and that this request was granted. For the respondent Government and the Chamber the involvement of the investigating judge was considered to satisfy the requirement of adequate procedural safeguards.

96. The Court, however, is not satisfied that the involvement of the investigating judge in this case could be considered to provide an adequate safeguard. It notes, firstly, the lack of any legal basis for the involvement of the investigating judge. Being nowhere required by law, it occurred at the sufferance of the public prosecutor.

97. Secondly, the investigating judge was called in what can only be described as an advisory role. Although there is no suggestion that the public prosecutor would have compelled the surrender of the CD-ROM in the face of an opinion to the contrary from the investigating judge, the fact remains that the investigating judge had no legal authority in this matter - as he himself admitted (see paragraph 21 above). 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.

98. Such a situation is scarcely compatible with the rule of law. The Court would add that it would have reached this conclusion on each of the two grounds mentioned, taken separately.

99. 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.

100. In conclusion, 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".

D. Compliance with the other requirements of Article 10 § 2

101. Having reached the conclusion that, given the absence of the requisite procedural safeguards, the compulsion by the authorities to disclose information in the present case was not "prescribed by law" as required by this provision, the Court need not ascertain whether the other requirements of the second paragraph of Article 10 of the Convention were complied with in the instant case – namely, whether the interference pursued one of the legitimate aims stated in that paragraph and whether it was necessary in a democratic society in pursuance of such aim.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

103. The applicant company made no claim in respect of pecuniary or non-pecuniary damage.

B. Costs and expenses

104. The applicant company submitted the following claims, supported by time-sheets, in respect of costs and expenses:

in respect of the domestic proceedings, 49,111.15 euros (EUR) not including value-added tax;

in respect of the proceedings before the Grand Chamber, EUR 68,022.00 (the Court understands this sum not to include value-added tax).

The lawyers who represented the applicant company before the Chamber waived all costs in respect of the Chamber proceedings.

The applicant company's total claims thus came to EUR 117,133.15.

105. The Government disputed the existence of a causal link between these costs and expenses and the events now found by the Court to have violated the Convention. They assumed that any violation which the Court might find, if violation there were, would relate to the lack of procedural safeguards. In their view, the seizure of the journalistic materials as such was a distinct issue; the decisions of the domestic authorities had not in themselves been contrary to Article 10 of the Convention and could

therefore not give rise to an award of the sums claimed by the applicant company.

106. In the alternative, they submitted that the sums claimed were excessive.

107. Speaking at the Court's hearing on 6 January 2010, the Government's Agent drew attention to a press release suggesting that the applicant company's representatives were paid by the non-governmental body *Stichting Persvrijheidsfonds* (Fund for the Freedom of the Press).

108. Invited by the Court to respond to this statement in writing, the applicant company acknowledged that they were supported by that body inasmuch as it had promised to pay EUR 9,000 towards legal costs in the event that the Court should deny them their claim; however, they would be liable for the entire amount if they prevailed.

109. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, as recent authorities, *Šilih*, cited above, § 226,; *Mooren v. Germany* [GC], no. 11364/03, § 134, ECHR 2009-...; and *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 229, ECHR 2009-...).

110. The Court finds it established that the applicant company actually incurred legal costs in the sense that they, as client, made themselves legally liable to pay their legal representatives on an agreed basis. The arrangements they made to cover their financial obligations to their representatives are not material for the purposes of Article 41. The situation in the present case is distinguishable from that in which liability for legal costs is borne by a third party (see *Dudgeon v. the United Kingdom* (former Article 50), 24 February 1983, §§ 21-22, Series A no. 59).

111. Although the Court takes the Government's point that it has not ruled on the substantive justification of the seizure complained of, for the purpose of costs and expenses it cannot in the present case separate procedure from substance. The proceedings initiated by the applicant company were appropriate to their complaint of inadequate procedural protection in that they offered the domestic authorities a realistic opportunity to redress the substantive failings alleged. Indeed, it is difficult to conceive that the Court would have declared the application admissible had the applicant company not made use of the possibilities offered by domestic law. A causal link between the violation found and the costs claimed therefore exists; in other words, the costs were "necessarily incurred".

112. However, the Court agrees 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.

113. 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, plus any tax that may be chargeable to the applicant company.

B. Default interest

114. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months, EUR 35,000 (thirty-five thousand euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 14 September 2010.

Michael O'Boyle	Jean-Paul Costa
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate concurring opinion of Judge Myjer is annexed to this judgment.

J.-P.C.
M.O'B

CONCURRING OPINION OF JUDGE MYJER

1. "*An unsatisfactory feature of Protocol No. 11 to the Convention, which ushered* in the *permanent Court in Strasbourg, is that a national judge who has already been party to a judgment of a Chamber in a case brought against his or her State is not only entitled but, in practice, required, to sit and vote again if the case is referred to the Grand Chamber. In his Partly Dissenting Opinion in the case of Kyprianou v. Cyprus ([GC], no. 73797/01, ECHR 2005-...), Judge Costa described the position of the national judge in such circumstances as "disconcerting", the judge having to decide whether to adhere to his or her initial opinion on the case or "with the benefit of hindsight [to] depart from or even overturn [that] opinion".*

Where the case has already been fully argued and discussed at the Chamber level and no new information or arguments have been advanced before the Grand Chamber, national judges have, unsurprisingly, normally adhered to their previous opinion, although not necessarily to the precise reasoning which led to that opinion in the Chamber.

In the present case, the material and arguments before the Grand Chamber did not differ in any significant respect from those before the Chamber. I have, nevertheless concluded, on further reflection, that my previous view on the main issue was wrong and I have voted with the majority in finding that the applicants' rights under Article 8 were violated."

Those were the words of my learned friend and colleague Sir Nicolas Bratza in his concurring opinion in the case of *Dickson v. the United Kingdom* [GC], no. 44362/04, ECHR 2007-XIII. A majority of twelve to five of the Grand Chamber in that case found a violation of Article 8. Sir Nicolas's change of opinion was the more courageous for it. No one would have held it against him if he had voted with the minority.

In the deliberations of the Grand Chamber in the present case there was an overwhelming majority in favour of violation. In the Chamber I was one of the majority of four to three who found no violation.

It seems to be that any judge who is a lone voice against all others in the Grand Chamber will have to come up with very persuasive arguments indeed, but a national judge even more so. A suspicion may well arise that that judge is incapable of taking the necessary critical distance of legal practice in his or her country of origin.

The fact is that I have not found sufficient convincing reason to stick to my guns and vote for no violation. I was originally of the opinion that this was a borderline case in which the circumstances of the case ultimately tipped the scales towards the respondent. I am still of the opinion that this is a borderline case, even after hearing the views of the other members of the

Grand Chamber, and I even ask myself whether this case really raises "a serious question affecting the interpretation or application of the Convention ... or a serious issue of general importance" (Article 43 § 2 of the Convention). The fact that the present judgment contains several useful summing-ups of general applicable principles does not change that view. Be that as it may, I am now prepared to cross the room and join my colleagues in finding that there has been a violation of Article 10.

2. I am deeply aware that in a case such as the present, there is a huge difference between the perception of the police and the prosecution and that of the applicant. The police and the prosecution were faced with an emergency. There was an investigation ongoing into a series of ram raids. The defining moment came when one of the ram raiders threatened a bystander with a firearm. Faced with so serious a threat to the public, the authorities had no longer any alternative but to do their utmost to bring the perpetrators to book. The make of the getaway car was known. Someone remembered an intercepted telephone conversation which had yielded the information that one of the suspected ram raiders had participated in an illegal street race. It was known that a photographer commissioned by the magazine *Autoweek* had taken pictures at the time; it was felt necessary to check whether the getaway car was the same as the car used by the suspected ram raider in the street race. The public prosecutor immediately ordered the pictures to be handed over. *Autoweek*'s editorial team were not told what it was all about. All they were told was that there was an investigation ongoing into the illegal streetrace and it concerned a matter of life and death.

The applicant, publisher of *Autoweek*, was confronted with an order to surrender journalistic materials. Neither the police nor the prosecution were prepared to say any more than that the matter was one of life and death. Invoking their journalistic privilege of non-disclosure of the sources, the applicant company refused to surrender the photographs and called in their lawyers.

A stalemate ensued. The police and the prosecution were concerned to arrest the ram raiders as quickly as possible and brought all their authority to bear. Time was pressing. They refused to give any detailed explanation as to precisely why the photographs were so important to them. They indicated only that they were seeking to resolve a serious crime and not to prosecute the participants of the illegal street race.

Eventually, *Autoweek*'s lawyer suggested calling in the investigating judge to mediate, as it were, in an attempt to break the stalemate.

Having been informed by the public prosecutor of the background of the case for which the photographs were needed, the investigating judge took the view that there was in fact every reason for the applicant company to be required to surrender the photographs.

Autoweek's representative then handed over the photographic material under protest.

The Regional Court later took the properly judicial view that there had been ample reason for the authorities to demand the handover of the photographs. It did, however, express itself critically on the way in which the police and the prosecution had conducted themselves in this case.

3. In the Chamber judgment too the majority, although they found no violation, animadverted on the conduct of the police and the prosecution in the case. In paragraph 63 of their judgment they echoed the Regional Court of Amsterdam in expressing the view that the actions of the police and the public prosecutor were characterised by "a regrettable lack of moderation". They also expressed their disquiet at the salient feature of the case, namely (from the Convention perspective) the fact that "the prior involvement of an independent judge is no longer a statutory requirement" (paragraph 62). Even so, they were able to state their reasons for finding no violation of Article 10. These were the following:

Unlike the cases of journalistic source protection which the Court has been faced with until now, the police were not actually after the identity of the sources. Their purpose was solely to use the material in question to solve a serious and dangerous crime that had only just been committed. I would think it safe to assume that the material has been used for no other purpose.

Although in Netherlands law there was no longer provision made for any prior review by an independent judge of orders for the surrender of journalistic material, in the case at hand there had actually such review in the end. Admittedly this had been done at the insistence of the applicant's counsel himself, in order to defeat the stalemate, but even so the judge who had been called in was an independent judge. That means that *Autoweek*'s publishers had the benefit of protection going beyond the review *post factum* offered by the Regional Court (which incidentally also concluded that there had been reason enough to demand the surrender of the journalistic material).

4. The Grand Chamber, for its part, is more impressed by the absence of any statutory provision in Netherlands law for prior judicial review before the police or the prosecution were allowed to seize journalistic materials. As mentioned, the Chamber also considered that disquieting but attached more importance to the fact that ultimately a judge had given his prior opinion. The Grand Chamber's argument that that judge lacked all official powers in the matter does not convince me. I have every reason to believe that since the public prosecutor had agreed with *Autoweek*'s lawyer to involve the judge, any opinion expressed by the latter to the effect that the photographic material was not to be handed over would have been respected and would

have resulted in an immediate end to the attempts to seize the materials that evening. That said, I am convinced by the reasoning of the Grand Chamber in stressing the need, even if prior review is provided for, to set out a clear decision model requiring the judge to consider whether a more limited interference with journalistic freedom will suffice (paragraph 92). It certainly adds to the case-law to demand such a proportionality test (or subsidiarity test, if one will) so clearly and explicitly.

5. "What would your answer have been if a similar case, with a comparable show of force by the police and the prosecution service, had been brought before us from one of the new democracies?" is a question which I have been asked by a colleague from one of those countries. "Would you still have allowed yourself to be satisfied by the involvement, at the eleventh hour, of a judge who has no legal competence in the matter?"

A remark of similar purport was made in the dissenting opinion appended to the Chamber judgment: "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'."

That was ultimately the push I 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.