



Doc. 11457

28 November 2007

Fair trial issues in criminal cases concerning espionage or divulging state secrets

Reply to Recommendation¹: Recommendation 1792 (2007)
Committee of Ministers

1. The Committee of Ministers has examined with attention Parliamentary Assembly [Recommendation 1792 \(2007\)](#) on fair trial issues in criminal cases concerning espionage or divulging state secrets, which it has transmitted to the member states' governments as well as to the European Commission for the Efficiency of Justice (CEPEJ), the European Committee on Legal Co-operation (CDCJ), the European Committee on Crime Problems (CDPC), the Group of States against Corruption (GRECO), the Steering Committee for Human Rights (CDDH) and the Steering Committee on the Media and New Communication Services (CDMC) for information and possible comments. The comments received from these committees are appended to this reply.

2. Like the Parliamentary Assembly, the Committee of Ministers believes that freedom of expression and information are fundamental components of a democratic society. It refers to its Recommendation Rec(2007)7 on good administration, according to which the public authorities shall act in accordance with the principle of transparency, although this does not prejudice secrets protected by law. More particularly, the legislation on official secrecy in force in member states should be clear and specific, without vague and overly broad provisions and should be applied in a way compatible with the right to freedom of expression and information. The Committee of Ministers wishes to point out that, in accordance with the relevant case law of the European Court of Human Rights, a norm cannot be considered a "law" if it does not fulfil the criterion of foreseeability, which requires that it be formulated with sufficient precision, and the criterion of accessibility, which allows citizens to conduct themselves accordingly.

3. With regard to paragraph 1.2 of the recommendation concerning the protection of whistleblowers, the Committee of Ministers wishes to draw the Parliamentary Assembly's attention to Recommendation Rec(2000)10 on codes of conduct for public officials and the model code appended to it, which in its Article 12 specifically addresses the issue of reporting by public officials of various types of misconduct to the appropriate authorities as well as the protection of those who report such misconduct in good faith. Further, Article 9 of the Civil Law Convention on Corruption (ETS No. 174) requires parties to ensure appropriate protection against any unjustified sanction for employees, both in the public and the private sectors, who report their suspicion in good faith internally to responsible persons or externally to authorities.

Similar provisions also exist in other Council of Europe instruments such as Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence, Recommendation Rec(2001)11 on guiding principles in the fight against organised crime and Recommendation Rec(2005)9 on the protection of witnesses and collaborators of justice.

4. The Committee of Ministers also wishes to point out that the CDMC is currently looking, from various angles, into "ways and means of enhancing the protection of 'whistleblowers' and journalists, who expose corruption, human rights violations, environmental destruction or other abuses of authority, in all Council of

1. Adopted by the Committee of Ministers on 21 November 2007, at the 1011th meeting of the Ministers' Deputies.



Europe member states". In this connection, it refers to the guidelines on protecting freedom of expression and information in times of crisis and to the declaration on the protection and promotion of investigative journalism adopted in September 2007.

5. In this connection, the Committee of Ministers draws attention to the fact that, according to the Court's case law, the protection of journalistic sources is one of the basic conditions for freedom of the press and hence an order to disclose a source cannot be justified unless there is an overriding requirement in the public interest. The Committee of Ministers recommends member states to take advantage of the applicable above-mentioned instruments and mechanisms with a view to reviewing and, where appropriate, amending their legislation on state secrecy to protect their citizens from possible arbitrary interference by public authorities.

6. Finally, the Committee of Ministers draws the Assembly's attention to the recent statement made by the Commissioner for Human Rights which underlines that investigative journalists and whistleblowers must be protected. In addition to protecting sources of information, he indicated that an immediate step would be to release all those who have been imprisoned because of their journalistic work and to declare a moratorium on the use of criminal defamation laws.

Appendix 1 – Opinion of the Group of States against Corruption (GRECO) on Parliamentary Assembly Recommendation 1792 (2007) on fair trial issues in criminal cases concerning espionage or divulging state secrets

At their 994bis meeting (7 and 9 May 2007), the Ministers' Deputies of the Council of Europe decided to communicate Recommendation 1792 (2007) of the Parliamentary Assembly of the Council of Europe on fair trial issues in criminal cases concerning espionage or divulging state secrets to GRECO for possible comments. At its 33rd plenary meeting (29 May to 1 June 2007), GRECO adopted the following comments with a view to their transmission to the Committee of Ministers.

1. Freedom of speech and information, as referred to in paragraph 1.1.2 of Recommendation 1792 (2007), are fundamental components of a democratic society. More particularly, transparency and accountability of public administration are inseparable from effective action against corruption and other abuses of authority and office. Transparency enables citizens to check what the administration is doing on their behalf and aims at enhancing their trust in their institutions. In accordance with the objectives pursued by Guiding Principle 9,²GRECO has recommended, in a number of country evaluation reports, adopting suitable rules on administrative openness, particularly as regards access to official documents, by limiting possible restrictions.
2. GRECO notes with interest paragraph 1.2 of the Assembly's recommendation which invites the Committee of Ministers to urge all member states to "look into ways and means of enhancing the protection of whistleblowers". In this connection, GRECO wishes to draw attention to Recommendation Rec(2000)10 on codes of conduct for public officials and the model code appended to it, which in its Article 12 specifically addresses the issue of reporting by public officials of various types of misconduct to the appropriate authorities as well as the protection of those who report such misconduct in good faith. Further, Article 9 of the Civil Law Convention on Corruption (ETS No. 174) requires parties to ensure appropriate protection against any unjustified sanction for employees, both in the public and the private sectors, who report their suspicion in good faith internally to responsible persons or externally to authorities.
3. Similar provisions also exist in other Council of Europe instruments such as Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence; Recommendation Rec(2001)11 on guiding principles in the fight against organised crime; Recommendation Rec(2005)9 on the protection of witnesses and collaborators of justice; and the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196).
4. In the light of the results of its monitoring of Council of Europe anti-corruption instruments, GRECO takes the strong view that an important means of breaking the corruption spiral and to hold public officials accountable for their actions is to introduce an effective system for reporting suspicions of corruption and other abuses. Such a system must necessarily encompass laws and practices which not only encourage people to question or challenge misconduct they see or suspect in their workplace, but which also ensure that whistleblowers, who signal such misconduct, are fully protected from possible retaliation or defamation suits.
5. Yet, despite the widespread existence of legal requirements to report corruption, GRECO has rarely found that these have helped change the culture of silence that corruption and other abuses can breed. The main reasons for this appear to be the fear of repercussions at work and doubt as to whether action will eventually be taken internally to address the problem. In this context, GRECO has observed in the course of its second evaluation round, that it is not enough to provide that whistleblowers cannot be disciplined or dismissed for reporting wrongdoing since there could well be other more subtle types of retributive action. While recognising, in principle, the state's legitimate interest in protecting official secrets, GRECO wishes to stress that whistleblowers may need reassurance that they cannot be disciplined for revealing confidential information. Hence, GRECO has repeatedly recommended the establishment of systems to ensure the additional protection of whistleblowers from any form of "disguised" discrimination and damage as a result of having made allegations of corruption or other infringements. GRECO therefore welcomes the Assembly's endeavours to contribute to raising the awareness of political leaders and the general public of this critical issue which is clearly of relevance to the stability of democratic institutions.

2. The Twenty Guiding Principles for the fight against Corruption (Resolution (97) 24).

Appendix 2 – Opinion of the Steering Committee on the Media and New Communication Services (CDMC) on Parliamentary Assembly Recommendation 1792 (2007) on fair trial issues in criminal cases concerning espionage or divulging state secrets

The Steering Committee on the Media and New Communication Services (CDMC) welcomes Recommendation 1792 (2007) of the Parliamentary Assembly of the Council of Europe on fair trial issues in criminal cases concerning espionage or divulging state secrets. The CDMC shares the view of the Parliamentary Assembly expressed in its corresponding Resolution 1551 (2007) that the state's legitimate interest in protecting official secrets must not become a pretext to unduly restrict the freedom of expression and information.

The CDMC also agrees that the legislation on official secrecy in force in member states should be clear and specific, without vague and overly broad provisions and that it should be applied in a way compatible with the right to freedom of expression and information. Indeed, the application of such legislation should be consistent with the relevant case law of the European Court of Human Rights – see, for example, *Stoll v. Switzerland* (2006). In the CDMC's view, in so far as media are concerned, this requires, *inter alia*, that the aim pursued by preserving state secrets is not outweighed by the information needs of society in general, and voters in particular, for them to be able to properly exercise their rights in a democracy.

As concerns paragraph 1.2 of Recommendation 1792 (2007), the CDMC would like to recall that it is currently looking, from various angles, into “ways and means of enhancing the protection of ‘whistleblowers’ and journalists, who expose corruption, human rights violations, environmental destruction or other abuses of authority, in all Council of Europe member states”.

The guidelines to member states on protecting freedom of expression and information in times of crisis prepared by the CDMC's subordinate Group of Specialists on freedom of expression and information in times of crisis (MC-S-IC), adopted by the Committee of Ministers on 26 September 2007, recalls that member states should protect the right of journalists not to disclose their sources of information in accordance with Recommendation Rec(2000)7 of the Committee of Ministers of the Council of Europe.

The guidelines also propose that, in principle, media professionals should not be required by law-enforcement agencies to hand over information or material (for example, notes, photographs, audio and video recordings) nor should such material be liable to seizure for use in legal proceedings. Any exceptions to this approach should be strictly in conformity with Article 10 of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights.

Another instrument prepared by the MC-S-IC and adopted by the Committee of Ministers on 26 September 2007 – declaration on the protection and promotion of investigative journalism – proposes that member states are called upon to guarantee that deprivation of liberty, disproportionate pecuniary sanctions, prohibition to exercise the journalistic profession, seizure of professional material or search of premises are not misused to intimidate media professionals, notably those who expose corruption, violations of human rights and other abuses of authority.

The above-mentioned declaration also proposes to call on member states to incorporate into domestic legislation, where appropriate, the recent case law of the European Court of Human Rights which has interpreted Article 10 of the European Convention on Human Rights as extending its protection not only to the freedom to publish but also to journalistic research – the important preceding stage which is essential for investigative journalism.

In the same instrument, it is proposed that member states pay special attention (and take remedial action where appropriate) to recent worrying trends such as:

- lawsuits brought against media professionals for acquiring or publishing information of public interest which the authorities sought without good reason to keep undisclosed;
- cases of unjustified surveillance of journalists, including the monitoring of their communications;
- legislative measures being taken or sought to limit the protection granted to “whistleblowers”.

Appendix 3 – Opinion of the European Commission for the Efficiency of Justice (CEPEJ) on Parliamentary Assembly Recommendation 1792 (2007) on fair trial issues in criminal cases concerning espionage or divulging state secrets

The Bureau of the CEPEJ has considered the Parliamentary Assembly Recommendation 1792 (2007) on fair trial issues in criminal cases concerning espionage or divulging state secrets, together with Resolution 1551 (2007).

The Bureau has taken note of Recommendation 1792 (2007), which concerns issues on the content and does not raise in itself specific questions regarding the efficiency of judicial systems. When turning to the subsequent Resolution 1551 (2007), it underlined that the main principle of a fair trial and the rights of defence, as stated in particular in Article 6 of the European Convention on Human Rights and in the Court's case law, are clearly recalled. It also stressed that in criminal cases concerning espionage and divulging state secrets, like in any other judicial proceedings, justice must operate with efficiency, with due concern to the parties.

Appendix 4 – Opinion of the European Committee on Legal Co-operation (CDCJ) on Parliamentary Assembly Recommendation 1792 (2007) on fair trial issues in criminal cases concerning espionage or divulging state secrets

1. Following the adoption by the Parliamentary Assembly of Recommendation 1792 (2007) on fair trial issues in criminal cases concerning espionage or divulging state secrets, the Committee of Ministers decided to communicate it to the European Committee on Legal Co-operation (CDCJ), for information and possible comments by 31 August 2007.

2. The Bureau of the CDCJ took note of the recommendation of the Parliamentary Assembly and decided to comment on domains which are of particular interest to the CDCJ.

3. The Bureau of the CDCJ shares the observations of the Parliamentary Assembly concerning the lack of clarity and precision of legislation on official secrecy in some member states (paragraph 1.1.1 of the recommendation). The explanatory memorandum to this recommendation also sets out in paragraphs 64 and 65 that several member states preserve legal provisions which are publicly inaccessible.

The Bureau of the CDCJ stresses that following the principle of legality a norm can not be regarded as “law” unless it satisfies the criteria of foreseeability, which requires it to be formulated with sufficient precision, and accessibility to enable citizens to regulate their conduct (*The Sunday Times v. the United Kingdom* judgment of 26 April 1979, paragraph 49). The Bureau of the CDCJ is also mindful that such provisions may lead to abusive or unwarranted applications, especially in the absence of an independent and impartial judiciary, and strongly recommends that member states review and, if necessary, modify their legislation on official secrecy in order to exempt their citizens from arbitrary interferences by public authorities with freedom of expression.

4. The Bureau of the CDCJ welcomes the call of the Parliamentary Assembly to urge member states to apply domestic law on official secrecy in strict compliance with freedom of speech and information as defined under the European Convention on Human Rights (ECHR). The Bureau of the CDCJ notes with concern that the explanatory memorandum refers in paragraphs 50 and 51 to individual cases, where accused persons were deprived of an opportunity to present evidence to prove that the information they were accused of passing to foreign sources had long been available in the public domain. While the principle of transparency of good administration does not prejudice secrets protected by law (Committee of Ministers Recommendation Rec(2007)7 on good administration), it is, however, not justified under Article 10/2 of the European Convention on Human Rights to classify as a state secret an information which had already been made public (*Vereniging Weekblad Bluf! v. the Netherlands* judgment of 9 February 1995, paragraph 45) or to prevent the disclosure of certain information which had ceased to be confidential (*The Sunday Times v. the United Kingdom* (No. 2) judgment of 26 November 1991, paragraphs 52 to 56). The Bureau of the CDCJ in particular underlines that member states should refrain from invoking the legitimate interest of state security as a pretext to stifle scientific co-operation and intimidate human rights defenders (paragraph 1.1.2 of the recommendation).

5. Regarding paragraph 1.2, the Bureau of the CDCJ concurs with the Parliamentary Assembly in stressing the need to enhance the protection of whistleblowers and journalists who expose various forms of abuses of public authority in member states. The Bureau of the CDCJ notes that state employees (including former ones) and journalists, having exposed human rights and environmental violations and corruption by public authorities in member states, often also face prosecutions for breach of state secrecy. The Council of Europe Civil Law Convention on Corruption, moreover, in its Article 9 obliges member states to provide appropriate protection against any unjustified sanction for employees who disclose information on corruption. It should be noted that disclosure of classified information by state officials may potentially involve press freedom, such as the right of journalists not to disclose their sources of information. The Bureau of the CDCJ emphasises that member states should bear in mind that the interest of democratic society in maintaining a free press should weigh heavily in determining whether the restriction, which can take the form of a disclosure order, was proportionate to the legitimate aim pursued (*Goodwin v. United Kingdom* judgment of 27 March 1996, paragraph 40; appendix to Committee of Ministers Recommendation Rec(2000)7 principle 3 on the limits to the right of non-disclosure). The principle of proportionality should in all circumstances be taken into consideration when determining the need and type of civil injunction.