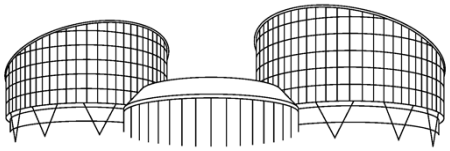

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

# CASE OF HALET v. LUXEMBOURG

*(Application no. 21884/18)*

JUDGMENT

Art 10 • Freedom of expression • Criminal-law fine of EUR 1,000 for disclosing to the media confidential documents from a private-sector employer concerning the tax practices of multinational companies (*Luxleaks*) • Consolidation of the European Court's previous case-law on the protection of whistle-blowers and fine-tuning of the criteria established in the *Guja* judgment • No abstract and general definition of the concept of whistle-blower • Claim for protection under this status to be granted depending on the circumstances and context of each case • Overall assessment by the Court of the *Guja* criteria, taken separately, but without hierarchy or specific order • Channel selected to make the disclosure was acceptable in the absence of illegal conduct by the employer • Authenticity of the disclosed documents • The applicant's good faith • Necessary balancing of competing interests at stake by the Grand Chamber, as the domestic courts' balancing exercise did not satisfy the requirements identified in the present judgment • Overly restrictive interpretation of the public interest of the disclosed information, which had made an essential contribution to a pre-existing debate of national and European importance • Only the detriment caused to the employer taken into account by the domestic courts • Public interest in the disclosure outweighed all of the detrimental effects, including the theft of data, the breach of professional secrecy and the harm to the private interests of the employer's customers • Disproportionate nature of the criminal conviction

STRASBOURG

14 February 2023

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

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**In the case of Halet v. Luxembourg,**

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

Robert Spano, *President*
Jon Fridrik Kjølbro,
Síofra O'Leary,
Georges Ravarani,
Yonko Grozev,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Pauliine Koskelo,
Tim Eicke,
Péter Paczolay,
Lado Chanturia,
Ivana Jelić,
Arnfinn Bårdsen,
Raffaele Sabato,
Mattias Guyomar,
Ioannis Ktistakis,
Andreas Zünd*, judges*,

and Abel Campos, *Deputy Registrar,*

Having deliberated in private on 2 February and 5 October 2022,

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

# PROCEDURE

1. The case originated in an application (no. 21884/18) against the Grand Duchy of Luxembourg lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Raphaël Halet ("the applicant") on 7 May 2018.

2. The applicant was represented by Mr C. Meyer, a lawyer practising in Strasbourg. The Luxembourg Government ("the Government") were represented by Mr David Weis, Government Agent before the European Court of Human Rights.

3. The applicant alleged that his criminal conviction, following the disclosure by him to a journalist of sixteen documents issued by his employer and subject to professional secrecy, had amounted to a disproportionate interference with his right to freedom of expression.

4. On 27 November 2018 this complaint was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court ("the Rules").

5. The application was allocated to the Third Section of the Court (Rule 52 § 1). On 11 May 2021 a Chamber of that Section composed of the following judges: Paul Lemmens, Georgios A. Serghides, Georges Ravarani, María Elósegui, Darian Pavli, Anja Seibert-Fohr, Peeter Roosma, and also of Milan Blaško, Section Registrar, declared the application admissible and delivered a judgment. On 21 June 2021 the applicant requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 6 September 2021 the panel of the Grand Chamber granted that request.

6. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant and the Government each filed written observations (Rule 59 § 1). As the applicant is of French nationality, the French Government were invited, if they so wished, to submit written observations and/or take part in the hearing before the Grand Chamber (Rule 44 § 3(a)). The French Government did not avail themselves of their right to intervene. Third-party comments were also received from the non-governmental organisations *La Maison des lanceurs d'alerte* (hereafter, "the MLA"), *Media Defence* and *Whistleblower Netzwerk E.V.* (hereafter, "WBN"), which had been given leave by the President of the Grand Chamber to take part in the written proceedings (Article 36 § 2 of the Convention and Rule 44 § 3). The non-governmental organisations *Article 19* and *Whistleblowing International Network*, acting also on behalf of *Transparency International*, *European Federation of Journalists*, *The Tax Justice Network* and *Blueprint for Free Speech*, were also granted leave to intervene as third parties in the written proceedings. Although invited to do so, they did not submit observations.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 February 2022.

There appeared before the Court:

(a) *for the Government*
Mr M. THEWES, barrister, *Principal Counsel*,
Mr H. RASSAFI-GUIBAL, lawyer, *Counsel*,
Ms A. JAOUID, representative of the Ministry of Justice, lawyer attached to the Department of Human Rights/Fundamental Rights, Secretariat General;

(b) *for the applicant*
Mr C. MEYER, *Counsel*,
Ms P. DUCOULOMBIER, *Adviser*.

The Court heard addresses by Mr Meyer, Mr Thewes and Mr Rassafi-Guibal, and also their replies to questions put by judges.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1976 and lives in Viviers (France).

### A. The factual background to the case

10. The applicant is a former employee of the company PricewaterhouseCoopers (hereafter, "PwC"), which provides auditing, tax advice and management consultancy services. PwC's activity consists, among other services, in drawing up tax returns for and on behalf of its clients, and in requesting advance tax rulings from the tax authorities. These rulings, which concern the application of tax legislation to future operations, are known as "Advance Tax Agreements" (hereafter, "ATAs"), "tax rulings" or "tax rescripts".

11. While employed by PwC, the applicant coordinated a five-person team and, he submitted, held a position that was not a minor one, but, on the contrary, involved tasks that were at the heart of PwC's activity; this consisted in obtaining the best possible treatment for its clients from the Luxembourg tax authorities. The Government disputed this description of his position, arguing that at the relevant time the applicant performed the tasks of an administrative employee, and that his duties consisted in gathering, centralising, scanning, saving and dispatching tax returns to the clients concerned.

12. Between 2012 and 2014 several hundred ATAs and tax returns prepared by PwC were published in various media outlets. These publications draw attention to a practice of highly advantageous tax agreements, concluded over the period 2002 to 2012 between PwC, acting on behalf of multinational companies, and the Luxembourg tax authorities.

13. An initial internal investigation by PwC established that on 13 October 2010, the day before he left the company following his resignation, an auditor, A.D., had copied 45,000 pages of confidential documents, including 20,000 pages of tax documents, corresponding to 538 folders of ATAs; in the summer of 2011 he had handed these over to a journalist, E.P., at the latter's request.

14. A second internal investigation by PwC led to the applicant's identification. Following the media revelations about some of the ATAs copied by A.D., the applicant had contacted E.P. in May 2012, offering to hand over other documents. This transfer, eventually agreed to by the journalist, took place between October and December 2012, and concerned sixteen documents, namely fourteen tax returns and two covering letters. Some of these documents were used by the journalist in a second television

programme, *Cash Investigation*, broadcast on 10 June 2013, one year after the first programme on the same topic.

15. On 5 and 6 November 2014 the sixteen documents were posted online by an association of journalists known as the International Consortium of Investigative Journalists ("ICIJ"). Their publication was described by the ICIJ as "*Luxleaks*". It appears from press articles that the *Luxleaks* affair led to "a difficult year" for PwC, but that, after this year, the company experienced an increased turnover which was accompanied by a significant expansion of its workforce.

16. On 2 December 2014 the applicant and the company PwC entered into a settlement agreement, under which the latter limited its claims to a symbolic one euro and was also granted authorisation to register a mortgage (*inscription hypothécaire*) of 10 million euros on the applicant's assets. It further provided for the applicant's dismissal at the end of his sick leave. On 29 December 2014 the applicant was dismissed after a period of notice.

## B. The criminal proceedings brought in the case

17. Following a complaint by PwC, A.D., E.P. and the applicant were charged by an investigating judge and committed for trial before the Luxembourg District Court by the investigating court.

### *1. The first-instance judgment*

18. On 29 June 2016 the Luxembourg District Court, sitting as a criminal court, convicted A.D. and the applicant of theft from one's employer (*vol domestique*), fraudulent access to a system for the processing or automatic transmission of data, breach of commercial secrecy, breach of professional secrecy and laundering and possession (*blanchiment-détention*).

19. A.D. was sentenced to a twelve-month prison term, suspended in its entirety, and to a fine of 1,500 euros (EUR). The applicant was sentenced to a nine-month prison term, suspended in its entirety, and a fine of EUR 1,000. They were also ordered to pay a symbolic sum of one euro to PwC as civil-law compensation in respect of non-pecuniary damage, the civil party having limited its claim to that amount. E.P. was acquitted, on the grounds that he had not participated, within the meaning of the law, as a co-perpetrator or accomplice, in the breach of commercial secrecy or in the breach of professional secrecy.

### *2. The proceedings before the Court of Appeal*

20. A.D. and the applicant lodged criminal-law and civil-law appeals against the first-instance judgment. The public prosecutor lodged a criminal-law appeal in respect of A.D., the applicant and E.P.

**(a) The submissions of the Attorney-General's Department**

21. In his submissions on appeal of 7 December 2016, the Attorney-General reviewed the facts of the case and drew attention to the applicable law. He stated that the applicant had removed sixteen documents, consisting in fourteen corporate tax returns, one covering letter for draft tax returns sent by the civil party (PwC) to the group A., and a notification letter sent by the civil party to the taxation authorities concerning the transformation of a limited company into a holding company, to which was attached the notarial deed certifying this change.

22. After referring to the factual elements in respect of each defendant, the Attorney-General then examined the respective legal developments concerning the application to the case of domestic law and of Article 10 of the Convention, relied on by the three defendants as a ground of defence. In this connection, he noted that the Court's case-law "undoubtedly grants protection to whistle-blowers against criminal proceedings" but pointed out that it made that protection subject to "a series of criteria, which the national courts are, of course, required to apply".

23. In his closing arguments, the Attorney-General sought the applicant's acquittal on the charges of breaching commercial secrecy and laundering of computer fraud, and submitted that the charges against him with regard to theft from one's employer, computer fraud, breach of professional secrecy and laundering of the proceeds of theft from one's employer had been made out. He also requested that the wording of the applicant's conviction for computer fraud be altered, so as to find that he had "fraudulently remained" in the data-processing system, and asked for the applicant's sentence to be varied to a fine.

The Attorney-General's submissions include the following points:

> "...
>
> (a) The criterion of the public interest of the information
>
> ...
>
> Denunciation of the practice of tax optimisation by transnational companies raises an important issue in the context of discussions on the principle of equal treatment. Those discussions are relevant from the point of view of other taxpayers, whether individuals or businesses. They are also important in terms of public confidence in the State's ability to safeguard this principle of equal treatment. Lastly, they concern the confidence of nationals of other European Union member States in the ability of their governments and of the EU institutions to safeguard this same principle within the Union.
>
> The question is also relevant from the standpoint of ensuring conditions for fair competition between transnational companies, on the one hand, and national companies, including small and medium-sized companies, on the other ...
>
> It is undeniable that the disclosures have given rise to a major international public debate.

It is equally undeniable that the disclosures have had extensive political consequences, including a change to the related practice in Luxembourg; implementation of an exchange of ATAs within the European Union; a commission of inquiry in the European Parliament; proceedings brought by the European Commission – essentially but not exclusively against Luxembourg – to ascertain whether certain ATA agreements amounted in part to State aid, prohibited by European Union law; as well as the opening of negotiations within the Organisation for Economic Co-operation and Development (OECD) to establish a uniform definition of tax bases.

It cannot therefore be seriously disputed that the criticism which motivated the acts is a matter of public interest.

This first criterion has therefore been complied with as regards both defendants.

(b) The criterion of the damage suffered

...

(ii) The case of Raphaël Halet

... – whether any real damage was occasioned:

As regards the civil party:

Damage was undeniably sustained in terms of harm to reputation, especially as this was the second "leak" of documents covered by professional secrecy within a short period of time and was widely covered in the media, thus becoming common knowledge.

Damage was undoubtedly also sustained in terms of a loss of confidence by current or potential clients in the civil party's ability to guarantee respect for professional secrecy.

...

As regards the clients:

It exists in terms of non-pecuniary damage following the breach of professional secrecy.

It undoubtedly also exists in terms of damage to their reputation, given the unfavourable media reports concerning these clients.

...

– Under domestic law, professional secrecy has a public aspect, so that the public interest in disclosure is set against a second public interest, and not merely against a private interest.

...

– With regard to the principle of proportionality, the number of documents handed over was 16, compared to the 500-plus documents transmitted by A.D. That being stated, the documents in question were covered by professional secrecy, and Halet handed them over without reservation or restriction ....

...

Having regard to all these elements, and, in particular, to the [applicant's] specific "duties and responsibilities" as recipient of a professional secret, the limited relevance of the documents in themselves and their disclosure at a time when the question had already been amply illustrated as a result of the acts committed by D., the alternatives

which the [applicant] had at his disposal to express himself on the subject without violating professional secrecy, the justification for this secrecy and the damage caused, even if the documents were in fact less secret than those disclosed by D., the balance of interests weighs against the public interest in the information.

In the present case, this interest was further reduced in that the documents reproduced information that could have been found elsewhere, although that fact did not entitle Raphaël Halet to disclose it in breach of his duty of loyalty towards his employer and of his duty of professional secrecy.

This criterion has not therefore been met by Raphaël Halet.

...

Raphaël Halet also acted in good faith and in the public interest and handed over authentic documents. However, he did not respect the principle of subsidiarity with regard to the subject matter of the disclosure and, essentially on the same grounds, with regard to the damage caused and the "weighing up of interests".

He cannot therefore benefit from total protection with regard to the criteria in the *Guja* case-law. The level of protection afforded to him is therefore lower, although he is not completely divested of protection under Article 10 of the Convention.

With regard to the criterion of the proportionality of the sentence, regard is to be had to the circumstance that [the applicant] was dismissed by his employer after the facts were discovered. Thus, a penalty has in fact already been imposed on him.

Having regard to those elements, it is appropriate to find that the charges against him have been made out, but it is proposed that he be sentenced only to a fine.

..."

**(b) The Court of Appeal's judgment**

24. In a judgment of 15 March 2017 the Court of Appeal of the Grand Duchy of Luxembourg set out the relevant facts as follows:

"...

During the programme 'Cash Investigation' of 11 May 2012 ... on the topic 'Tax havens: the little secrets of big business', the journalists referred to 47,000 pages of working documents from PwC, obtained from an anonymous source; they showed various images which appeared to be ATAs or confirmation letters ... These confidential requests concerning 'tax rescripts', on a PwC letterhead and approved by the tax authorities, were broadcast on screen and commented on by the speakers. The corporate structures set up by multinational companies for the purpose of tax optimisation, which had been approved by the Luxembourg Direct Tax Administration, were discussed. In total, 24 different PwC clients were mentioned or could be identified.

...

On 10 June 2013 the television channel ... broadcast a new Cash Investigation programme, which included a report entitled 'The tax-evasion scandal: Revelations on the billions we are missing'. Various tax documents prepared by PwC were shown on screen. These included an ATA which was known to be in the possession of the journalist E.P. since, as the internal investigation had shown, they were taken away by A.D., but also 4 tax returns, which were new documents that had been issued after the date of A.D.'s departure.

On 5 and 6 November 2014 the International Consortium of Investigative Journalists (hereafter the ICIJ) in collaboration with some forty media partners, posted on its website 28,000 pages of tax agreements drawn up between the auditing firm PricewaterhouseCoopers and the Luxembourg Direct Tax Administration, corresponding to 554 files, including 538 ATAs of multinational companies, previously removed fraudulently from PwC by A.D., and also 14 tax returns, a covering letter and a notification letter addressed to the Direct Tax Administration, which, as PwC discovered through an internal investigation, had been fraudulently removed by Raphaël David Halet.

The ICIJ's investigation and analysis of the documents shed light on the practice of ATAs for the period 2002 to 2010; in other words, highly advantageous tax agreements passed between the audit firm PwC on behalf of multinational companies and the Luxembourg Direct Tax Administration, permitting the inter-group transfer of income, resulting in an effective tax rate that was well below the legal tax rate.

These last revelations finally - two years after the leak allegedly committed by A.D. and Raphaël David Halet - triggered the so-called *Luxleaks* case.

On 9 December 2014 a new wave of tax documents, particularly the tax returns of well-known multinationals, was published by the ICIJ, building on the first set of disclosures, and once again shedding light on the tax practices of some thirty multinational companies; these revelations were referred to as 'Luxleaks 2'.

PwC lodged an additional complaint on 23 December 2014 regarding the theft of the 16 documents referred to above, including 14 tax returns, committed after A.D.'s departure and in respect of which a further internal investigation had identified Raphaël David Halet as the perpetrator. In the light of these facts, he was dismissed, with notice, by a letter dated 29 December 2014.

...

Raphaël David Halet maintains that he copied the tax returns of 14 well-known multinational companies for the purpose of communicating them to the journalist E.P. and thus supporting him in his investigations and his disclosures in the media...

...E.P. ... admits to having been contacted by Raphaël David Halet, who offered to pass on documents which would support his work and confirms that he advised [the applicant] to open an email account for the specific purpose of exchanging data. In this way, Raphaël David Halet allegedly sent him fourteen tax returns concerning internationally known multinational companies, some of which he used in the second programme ....

..."

25. With regard to the merits of the case, the Court of Appeal noted that A.D. and the applicant relied on Article 10 of the Convention, as interpreted by the Court, and requested, under that provision, that they be granted the status of "whistle-blower" and be acquitted. The Court of Appeal ruled on "whistle-blowers in Luxembourg law" as follows:

"...

The Court notes that neither of the two Luxemburgish texts which recognise whistle-blower status, namely Article L.271-1 of the Labour Code and section 38-12 of the Financial Sector Act (Law of 5 May 1993), provide either a definition of a 'whistle-blower' or specify the criteria for application of this status.

... these texts do not apply to the present case.

...

Accordingly, the Convention, as interpreted by the European Court [and] incorporated into Luxembourg law, ... will apply to the present case, in particular Article 10, which recognises and guarantees freedom of expression.

...

It follows from the provisions of Article 10 of the European Convention that everyone has the right to freedom of expression. ...

This essential freedom, enshrined in a supranational text, cannot be invalidated by national rules. Thus, in the context of a debate on a matter of general interest concerning tax avoidance, tax exemptions and tax evasion, the whistle-blower's freedom of expression may, where appropriate and subject to certain conditions, prevail and be relied on as a circumstance justifying a breach of national law.

Whistle-blowing as a justification neutralises the unlawful nature of the breach of the law, necessarily committed by the fact of divulging, in good faith and in a proportionate and appropriate manner, information that is in the public interest.

..."

26. With regard to the different charges, the Court of Appeal decided, for various reasons related to the domestic criminal law, that it was not necessary to find that the charges brought against A.D. and the applicant in respect of breach of commercial secrecy, or, in that connection, laundering and possession, or laundering and possession of the proceeds of computer-related fraud, had been made out.

27. It also considered, having regard solely to domestic criminal law, that the first-instance court had been correct in finding that A.D. and the applicant had committed the offences of theft from one's employer, fraudulent initial or continued access to a data-processing or automated transmission system, breach of professional secrecy and laundering of the proceeds of theft from one's employer. It considered, contrary to the findings of the first-instance court, that E.P. was to be regarded as complicit in the applicant's breach of professional secrecy, and in his laundering and possession of the proceeds of theft from one's employer. The relevant extracts from the Court of Appeal's judgment read as follows:

"...

At the relevant time Raphaël David Halet performed the duties of an administrative agent, which mainly consisted of collecting tax returns and ATAs, centralising them with his team, scanning them and saving them to a high-security computer directory and, if necessary, sending the tax returns to the clients concerned.

By virtue of his position, he was one of a limited number of people who had access to the 'Tax Process' directory, the data carrier in which certain of the tax returns were stored.

...

Raphaël David Halet contacted the journalist E.P. on 21 May 2012, after the transmission of the Cash Investigation programme on 11 May 2012..., by sending an email from his private email address... They met in person in Metz on 24 October 2012. On 26 October 2012 E.P. [had] asked the applicant to create a new email address, into which he would place the [relevant] photographs in the 'Drafts' folder, while communicating the address and password to E.P. by another means, thus enabling the journalist to retrieve them directly from the Gmail account.

It appears from the investigation that the documents were sent between 26 October 2012 and mid-December 2012.

The first-instance judges thus acted properly in holding that the removal of digital data occurred when they were attached to the drafts of the various emails, since it was at this point that they were transferred out of PwC's possession, from the latter's server to the email server, where they were accessible only to the persons who knew the password, that is, E.P. and Raphaël David Halet.

..."

28. As to the breach of commercial secrecy, the Court of Appeal concluded that this offence had not been established in the applicant's case, on the basis of the following reasoning:

"...

A tax return represents a legal act of information ... by which the taxpayer communicates to the Tax Authorities data which is used as a basis for taxation. Through this return, which is the real starting point of the taxation procedure, the taxpayer informs the tax authorities about its operations, any material facts and legal situations concerning it, information which is necessary in order to determine the amount of tax payable and to enable the authorities to carry out checks. The tax return also informs the authorities about the fiscal strategies adopted by the taxpayer and forms a genuine declaration of intent, in that it sets out requests for deductions and for the exercise of various taxation options provided for by law...

In communicating the fourteen tax returns of PwC clients and two letters, Raphaël David Halet did not disclose data that ought to be considered as commercial or manufacturing secrets pertaining to his employer within the meaning of Article 309 of the Criminal Code, since tax returns are simple unilateral statements, by the taxpayer, as to its financial situation and fiscal strategies.

Equally, and like A.D., Raphaël David Halet did not act for profit or in order to harm his employer, but to support E.P. in his investigation into tax evasion and to inform the public.

..."

29. With regard to the breach of professional secrecy, the Court of Appeal ruled as follows:

"...

As noted above ..., the secrecy of legally regulated professions, by reference to Article 458 of the Criminal Code, is a matter of public policy and the employer can therefore rely on it not only before employment tribunals, but also before any criminal court...

Established by a special law which regulates [the] profession, professional secrecy has a wider scope than the protection of the private life of a given individual and is intended to protect all individuals who may come into contact with this professional. This trust is essential for the proper functioning of the auditing and accounting profession and could not be fully guaranteed if the client's direct correspondent were the only person subject to secrecy, while any other employee or the archivist handling all the documentation were not subject to secrecy.

The obligation of secrecy, which is a matter of public policy, is general and extends to all of an auditor's activities...

By imposing secrecy as a general rule on the persons who are in their employment and targeting the information entrusted to them as a whole, the legislature extended the obligation of secrecy to all the persons employed in such companies, whatever their professional rank and in respect of all of the company's activities; the law does not distinguish on the basis of the type of task entrusted to the auditing company.

As section 22 of the above-mentioned Law of 18 December 2009 refers without distinction to all information entrusted to the auditor's firm, it necessarily includes documents created by the auditor, such as tax returns.

...

It is therefore irrelevant that Raphaël David Halet fraudulently withdrew tax returns prepared by another department, in other words secrets that had not been entrusted to him personally, since secrecy was, as a general rule, necessary for the exercise of his employer's activities.

In this case, the disclosure took place through the communication of fourteen tax returns to E.P. between October 2012 and December 2012, and specifically at the point when Raphaël David Halet communicated the password of the email account to E.P.

...

The judgment is therefore upheld on this point.

..."

30. The Court of Appeal also examined whether the offences committed, which were in principle to be regarded as proven, could be held to be justified under Article 10 of the Convention. With regard to E.P., it held that it was appropriate to recognise him as enjoying "the defence of responsible journalism", derived, in the Court's case-law, from Article 10 of the Convention. For this reason, it upheld E.P.'s full acquittal.

31. It assessed the situation of A.D. and the applicant in the light of the Court's case-law on the protection of whistle-blowers (referring, in particular, to *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008). It reiterated that this case-law made protection of whistle-blowers subject to compliance with six conditions, which it then analysed, after stating that "the unlawfulness of the divulged conduct is not a criterion in deciding whether to grant the protective status of whistle-blower; in such cases, the member of staff who denounces a serious shortcoming may rely on the protection of the Convention".

32. Ruling with regard to these six criteria, the Court of Appeal considered, firstly, that the revelations complained of were in the public

interest, in that they had "opened the way for a public debate in Europe and Luxembourg about the taxation ... of multinational companies, fiscal transparency, the practice of ATAs and tax fairness in general". It further noted that, following the *Luxleaks* disclosures, the European Commission had presented a package of measures against tax evasion and an action plan for fair and effective corporate taxation in the European Union. In this connection, the relevant parts of the judgment read as follows:

> "As regards the criterion of the public interest of the information ...
>
> The European Court considers as being of public interest or general interest very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate, without the act, omission, practice, conduct or shortcoming necessarily constituting a criminal offence.
>
> As noted by the representative of the public prosecutor's office, denunciation of the practice of tax optimisation by transnational companies raises an important issue in the context of the debate on compliance with the principle of equal treatment of taxpayers and on tax transparency. The revelations exposed distortions of competition ... between transnational companies benefiting from ATAs and small national companies which do not.
>
> These disclosures have been, and are still, widely covered in the European news media, and the European Commission has made the fight against fraud and tax evasion an absolute priority. In particular, following the *LuxLeaks* revelations, the Commission presented a package of measures against tax evasion and another package on tax transparency, as well as an action plan for fair and efficient corporate taxation in the European Union. On 18 March 2015 it put forward a proposal for an amending directive on the compulsory exchange of information in the tax field.
>
> On 8 December 2015, the Council [of the European Union] presented Directive (EU) 2015/2376 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, henceforth to include advance tax rulings.
>
> Taking into account these elements, and the initiatives taken at national level by the Member States, at European level by various committees (the TAX Committee and the JURI Committee), and the investigations opened by the Commission into the tax treatment granted by Luxembourg to certain multinational companies (which has been qualified as State aid granting unjustified advantages to the beneficiary companies, it is an accepted fact that the disclosures have opened the door to public debate in Europe and in Luxembourg on corporate taxation, in particular the taxation of multinational companies, tax transparency, the practice of ATAs and tax fairness in general.
>
> The information made public is therefore a matter of general interest."

33. The Court of Appeal also held that the information disclosed had been authentic, specifying that "the accuracy and authenticity of the documents disclosed both by E.P. and by Raphaël David Halet cannot be called into question".

34. As to the criterion that disclosing the information to the public could only be considered as a last resort, where it was clearly impossible to do otherwise, it considered that "in the present case and having regard to the

circumstances, informing the public through the media was the only realistic alternative in order to raise the alert".

35. Ruling next on the public prosecutor's argument that the documents handed over by the applicant to E.P. were of limited relevance, so that he did not fulfil the criterion of subsidiarity, the Court of Appeal held that this question ought to be examined in the context of weighing up the interests at stake. In this connection, it emphasised that through "the criterion of 'detriment caused' and 'balancing the respective interests', the Court assesses the respective damage caused by the impugned disclosure to the public authority or the private employer against the interest that the public could have in obtaining the disclosed information. On these various points, the Court of Appeal set out the following arguments:

> "...
>
> As set out above, the European Court does not analyse the harm sustained in specific terms, but considers that the damage caused to the employer may result from damage to its image, loss of confidence, and, in general, from the impact that the denunciation may have had on the public. The greater the media coverage of the case, and thus of the information that the employer wished to keep secret, the more the public's confidence is undermined.
>
> In the present case, PwC has been associated with a practice of tax evasion, if not tax optimisation described as unacceptable. It has been the victim of criminal offences and *has necessarily suffered harm.*
>
> It appears from Raphaël David Halet's statements during the investigation and at the hearings before the criminal court that he did not select the tax returns in order to supplement the ATAs already in E.P.'s possession and thus illustrate how the ATAs were reflected in the [corresponding] tax return, but that, on the contrary, his choice was directed by the extent to which the multinational company in question was well known.
>
> ...
>
> The documents provided were not such as to illustrate the practice of ATAs or provide examples of it, nor did they enable the attitude of the Direct Tax Administration towards these tax returns to be ascertained. They were of limited relevance given that the practice of ATAs had been disclosed through the documents provided by A.D. in the first Cash Investigation programme one year previously, something that Raphaël David Halet, who had seen the programme, knew. He was therefore aware that an investigative journalist had looked into the subject and a contribution had been made to the public debate.
>
> The European Court generally attaches great importance to the fact that the information revealed is genuinely secret, so that it cannot be obtained through any other channel. It considers that protection is called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large (*Guja*, § 72, and *Heinisch*, § 63).
>
> In the light of the number of documents that had been misappropriated the previous year, and the transmission of the Cash Investigation programme, there was no compelling reason for Raphaël David Halet to commit a fresh violation of the law by

appropriating and disclosing confidential documents, especially as the fourteen tax returns in question revealed nothing new about the practice of ATAs, their quantity or the tax optimisation technique.

The documents removed by Raphaël David Halet were used by E.P. as part of the second Cash Investigation programme, which focused on tax evasion and the 'billions we are missing', rather than on the practice of ATAs.

This programme was divided into three parts: ... the second part concerned tax evasion by three multinational companies which have subsidiaries in France: ...

To illustrate the tax evasion practiced by these multinational companies, which were the focus of the report, the tax returns of companies A. and A.M. were displayed as examples.

...

The journalist states in his defence pleadings that he showed, particularly with the help of the tax returns..., that the Luxembourg subsidiaries of group A. make a significant turnover ... but that there was no trace of activity at the head office of these subsidiaries and that no senior manager of these companies was present when he visited. The documentary also shows that, at the same time, the French tax authorities were claiming tax arrears of 198 million euros from the group A., although A. was simultaneously benefiting from public subsidies to set up logistics sites in France.

With regard to the A.M. group, the VAT return for 2010 of one of its subsidiaries was displayed during the programme in order to demonstrate, among other points, that the A. group had used this subsidiary to return, via Luxembourg, 173 million euros in reimbursement of interest on a loan granted to the subsidiary; this interest was tax-deductible for the subsidiary ... [thus] illustrating the practices of 'fiscal forum-shopping', in which Luxembourg is only one stage.

On this subject, [E.P.] pointed out during the programme that the A. group closed the Florange blast furnaces in November 2012 and made 600 metal workers redundant, in exchange for a promise, which was never kept, to invest 180 million euros in redeveloping the site, and that the French tax authorities, according to information published in the press, were claiming almost a billion euros in arrears from the A.M. group.

...

The information in relation to the first two companies may be regarded as alarming and scandalous, but it does not constitute essential or fundamentally new information.

The relevant tax returns ... merely confirmed the result of the journalistic investigation carried out by [E.P.]'s team. As such, they were certainly useful to the journalist, but [did] not however provide any previously unknown cardinal information capable of relaunching or contributing to the debate on tax evasion ...

Although the European Court held in the case of *Fressoz and Roire* that publication of the tax assessment of the managing director of a motor company was in the public interest, it noted that this interest arose from the fact that '*[t]he article was published during an industrial dispute – widely reported in the press – at one of the major French car manufacturers[; the] workers were seeking a pay rise which the company's management, led by J.C., were refusing*' ... The European Court concluded that by making such a comparison against that background, the impugned article contributed to a public debate on a matter of general interest.

It follows that a tax return in itself is not of public interest, but that it may become so depending on the context.

Thus, the documents handed over by Raphaël David Halet to the journalist neither contributed to the public debate on the Luxembourg practice of ATAs nor triggered the debate on tax evasion, and they did not provide any information that was essential, new and previously unknown.

The Court of Appeal considers that, given the limited relevance of the documents, [causing] detriment to his employer that outweighed the general interest, and through their disclosure at a time when the public debate on ATAs had already begun, and given the absence of [a contribution] to the debate of general interest on tax evasion, Raphaël David Halet does not meet the criterion of proportionality as regards the damage caused in relation to the general interest, so that the defence of whistle-blowing cannot be retained in his case.

...."

36. After balancing the interests at stake, the Court of Appeal concluded that the applicant could not benefit from the full protection of Article 10 of the Convention but only, under Luxembourg law, from the acknowledgement of mitigating circumstances. In this respect, it held that it was appropriate to assess whether he had acted in good faith and found this to have been the case.

37. With regard to A.D., it recognised that the criterion of good faith had been met in the summer of 2011, when the documents removed by him in October 2010 were handed over to the journalist E.P., but found that this had not been the case when he took possession of the documents, given that he had not yet intended at that time to make them public.

38. Lastly, the Court of Appeal concluded that A.D., who was entitled to rely on the defence of whistle-blowing with regard to the offence of handing over the documents to the journalist E.P. in the summer of 2011, ought to be acquitted of the offence of breaching professional secrecy. With regard to the offences not covered by this defence, namely those relating to the appropriation of the documents in October 2010, the Court of Appeal reduced the prison sentence to six months, suspended in full, and maintained the fine of EUR 1,500.

39. In the applicant's case, the Court of Appeal held that there had been a plurality of offences, so that, under the domestic criminal law, the most severe penalty could be increased to twice the maximum, namely a prison term of between three months and five years, and a fine of between EUR 251 and 5,000. Noting further that the applicant was not entitled to the defence of having acted as a whistle-blower, it decided instead, in determining the sentence, to have regard to mitigating circumstances, specifically "to the motive, which he believed to be honourable, to the disinterested nature of his actions, and to the absence of any previous criminal record". In consequence, it decided to dispense with any prison sentence and upheld the fine of EUR 1,000.

40. The Court of Appeal upheld the civil-law judgment ordering A.D. and the applicant to pay the symbolic sum of one euro as compensation for the non-pecuniary damage sustained by PwC.

*3. The Court of Cassation's judgments in respect of A.D. and the applicant, and the further proceedings in respect of A.D.*

41. A.D. and the applicant appealed on points of law against the Court of Appeal's judgment.

**(a) The Court of Cassation's judgment in respect of the applicant**

42. By a judgment (no. 2/2018, Criminal Division) of 11 January 2018, the Court of Cassation dismissed the applicant's appeal on points of law.

43. The applicant had submitted a legal argument alleging a violation by the Court of Appeal of Article 10 of the Convention, containing the following statement:

> "The Court of Appeal has misrepresented the facts and the case-law of the European Court of Human Rights, and interpreted in a tendentious manner 'the limited relevance of the documents' handed over to [E.P.], leading it to find that the detriment to the employer outweighed the general interest and to reject the defence of whistle-blowing, given that the criterion of the proportionality of the detriment caused in relation to the general interest was not met."

In the applicant's written submissions in support of this argument, he had emphasised that the appendices to the tax returns filed by group A. revealed annual general meetings with an average duration of one minute, confirming the total absence on this group's part of a genuine economic presence in Luxembourg. He had also stressed that the tax returns in question made it possible to evaluate the economic reality of the entity set up in Luxembourg and thus to analyse the scope of the use of ATAs.

44. Ruling on this argument, the Court of Cassation held as follows:

> "... Assessment of the facts which must underlie a decision as to whether a defendant can benefit from the defence of whistle-blower status falls within the sovereign domain of the courts with jurisdiction over the merits, and is not subject to review by the Court of Cassation, subject to the proviso that this assessment must not be derived from grounds that are insufficient or contradictory;
>
> In the present case, the appellate courts based their assessment on the nature of the documents removed by [the applicant], the use of those documents in the context of a television programme on tax evasion, the statements made by [the applicant] and by [E.P.] concerning the relevance of the documents taken, and concluded that the tax returns removed [by the applicant], while they had undoubtedly been useful to the journalist [E.P.], did not however provide any cardinal information, hitherto unknown, that was capable of relaunching or contributing to the debate on tax evasion;
>
> Contrary [to the applicant's argument], the factual findings reached by the appellate courts are not contradictory; ...

The appellate courts' assessment was thus based on grounds that were sufficient and free of contradiction; ..."

**(b) The Court of Cassation's judgment in respect of A.D.**

45. In contrast, the appeal on points of law lodged by A.D. was allowed by the Court of Cassation.

46. In its judgment (no. 1/2018, Criminal Division) of 11 January 2018, it quashed the Court of Appeal's judgment on the grounds that whistle-blower status ought in principle to be recognised in respect of all offences entailing the prosecution of a person who had availed himself or herself of the right guaranteed by Article 10 of the Convention, failing which the protection attached to whistle-blower status would be rendered ineffective. The Court of Cassation thus held that the Court of Appeal had breached Article 10 of the Convention by refusing to allow A.D. to rely on the defence of whistle-blowing as regards the fact of appropriating the documents that were removed in October 2010, given that it had accepted this defence with regard to the handing over of these documents to the journalist E.P. in the summer of 2011.

**(c) The Court of Appeal's remittal judgment with regard to A.D.**

47. In a judgment of 15 May 2018, the Court of Appeal, ruling after the Court of Cassation's judgment, held that A.D. ought to be acquitted, under Article 10 of the Convention, of all the offences committed in relation to the documents handed over to E.P. in the summer of 2011, including those related to the appropriation of these documents in October 2010.

48. The Court of Appeal considered, however, that the first appellate judgment had become final, and thus remained valid in respect of A.D. with regard to these same offences in so far as they related to the internal training documents that he had also removed in October 2010 when appropriating the tax documents that were subsequently handed over to E.P. In this connection it limited itself to suspending the pronouncement of the sentence.

49. This judgment was not contested by the parties, and consequently became final.

## II. RELEVANT NATIONAL AND INTERNATIONAL LEGAL FRAMEWORK

### A. Relevant domestic law

50. The provisions of the Luxembourg Criminal Code on theft from one's employer ("domestic theft", *vol domestique*) read as follows:

**Article 461 § 1**

"Anyone who fraudulently removes an object or an electronic key that does not belong to him or her shall be guilty of theft."

**Article 463**

"Thefts that are not specified in this Chapter shall be subject to a prison sentence of one month to five years and a fine of EUR 251 to 5,000."

**Article 464**

"A prison term of at least three months shall be imposed where the thief is a domestic servant [employee] or an individual providing his or her services in return for wages, even where the theft was committed against persons by whom he or she was not employed, but who were either in the employer's house [premises] or in a house to which he or she was accompanying the employer, or, if [the thief] is a workman, journeyman or apprentice, in his or her employer's house, workshop or shop, or a person usually working in the lodging where he or she committed the theft."

51. With regard to fraudulently retained access in an automated data-processing system, Article 509-1 § 1 of the Criminal Code provides:

"Anyone who fraudulently accesses or retains access to all or part of an automated data-processing or transmission system shall be subject to a prison term of between two months and two years and a fine of EUR 500 to 25,000, or to one of these two penalties."

52. The offence of a breach of professional secrecy is set out in Article 458 of the Criminal Code, which reads:

"Doctors, surgeons, health officials, pharmacists, midwives and all other persons who through their status or profession are entrusted with secrets and who reveal them, shall be punished by imprisonment for a period of between eight days and six months and a fine of between EUR 500 and 5,000, except where they are called to testify in court and where the law obliges them to make these secrets known."

53. Laundering and possession of the proceeds of theft from one's employer is set out in Article 506-1, which refers to Article 32-1.

Article 506-1, as in force at the relevant time, read as follows:

"The following shall be punished by a prison term of between one and five years and a fine of EUR 1,250 to EUR 1,250,000, or by one of these penalties alone:

(1) persons who knowingly facilitate, by any means, the provision of false explanations with regard to the nature, origins, location, availability, movement or ownership of the assets referred to in Article 32-1, sub-paragraph 1 (i), forming the object or the proceeds, direct or indirect: ... of a breach of Articles 463 and 464 of the Criminal Code ... or forming a pecuniary benefit based on one or several of these offences;

...

(3) persons who have acquired, held in their possession or used the assets referred to in Article 32-1, sub-paragraph 1 (i), forming the object or the proceeds, direct or indirect, of the offences listed in point (i) of that Article or forming a pecuniary benefit of any kind based on one or several of these offences, where they knew, at the point

when they received them, that they originated in one or several of the offences referred to in point (i) or from participation in one or several of these offences."

The above-mentioned "Article 32-1, sub-paragraph 1 (i)", which has since been repealed (by a Law of 1 August 2018), provided as follows:

"In the event of the offence of laundering referred to in Articles 506-1 to 506-8 ... a special confiscation order shall be applied: (i) to property comprising property of every kind, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property, property which is the object or direct or indirect proceeds of an offence or which constitutes any pecuniary benefit derived from the offence, including the income from such property ..."

Furthermore, Article 506-4 supplements Article 506-1 and provides:

"The offences referred to in Article 506-1 shall also be punishable where the perpetrator is also the perpetrator or accomplice in the primary offence."

## B. International and European law

### *1. International materials*

54. In his report A/70/361 of 8 September 2015, the UN Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression addressed the protection of sources of information and of whistle-blowers. In his argument, "the term 'whistle-blower' refers to a person who brings to light information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest. The relevant extracts of this report read as follows:

"... Whistle-blowers who, based on a reasonable belief, report information that turns out not to be correct should nonetheless be protected against retaliation. The whistle-blower's motivations at the time of the disclosure should also be immaterial to an assessment of his or her protected status. Variation centres around the inclusion of 'good faith' as an element of reporting, from the exclusion of a good faith requirement, to a good faith requirement only in the context of compensation as a remedy for retaliation, to inclusion of both 'good faith' and reasonable belief. 'Good faith,' however, could be misinterpreted to focus on the motivation of the whistle-blower rather than the veracity and relevance of the information reported. It should not matter why the whistle-blower brought the information to attention if he or she believed it to be true.

...

Whistle-blowing does not always involve specific individual wrongdoing, but it may uncover hidden information that the public has a legitimate interest in knowing. International authorities and States often provide a general protection for the disclosure of information in the public interest, or disclosure of specific categories of information, or both. ...

Regardless of the approach taken, the scope of protected disclosures should be easily understandable by potential whistle-blowers ...

...

Internal institutional and external oversight mechanisms should provide effective and protective channels for whistle blowers to motivate remedial action; in the absence of such channels, public disclosures should be protected and promoted ...

...

Where other mechanisms to disclose information about wrongdoing are unavailable or ineffective, the whistle-blower may disclose information of alleged wrongdoing to external entities, either the media or others in civil society, or by self-publishing. The public-disclosure whistle-blower in such circumstances should be protected.

..."

*2. Texts adopted by the Council of Europe*

55. On 29 April 2010 the Parliamentary Assembly of the Council of Europe adopted Resolution 1729(2010) on the protection of "whistle-blowers", in which it recognised the importance of "whistle-blowers", whom it defined as "concerned individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk – as their actions provide an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, both in the public and private sectors". Under the terms of that Resolution:

"...

Relevant legislation must first and foremost provide a safe alternative to silence.

...

6.2.2 This legislation should protect anyone who, in good faith, makes use of existing internal whistle-blowing channels from any form of retaliation (unfair dismissal, harassment or any other punitive or discriminatory treatment).

6.2.3 Where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected.

6.2.4 Any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives.

..."

56. On 1 October 2019 the Parliamentary Assembly also adopted Resolution 2300(2019) on "Improving the protection of whistle-blowers all over Europe", in which it stated that "whistle-blowers play an essential role in any open and transparent democracy. The recognition they are given and the effectiveness of their protection in both law and practice against all forms of retaliation constitute a genuine democracy 'indicator'". Under the terms of that Resolution:

"...

4. Without whistle-blowers, it will be impossible to resolve many of the challenges to our democracies, including of course the fight against grand corruption and money laundering, as well as new challenges such as threats to individual freedom through the mass fraudulent use of personal data, activities causing serious environmental harm or threats to public health. There is therefore an urgent need to implement targeted measures which encourage people to report the relevant facts and afford better protection to those who take the risk of doing so.

5. Accordingly, the term whistle-blower must be broadly defined so as to cover any individual or legal entity that reveals or reports, in good faith, a crime or lesser offence, a breach of the law or a threat or harm to the public interest of which they have become aware either directly or indirectly.

..."

In this Resolution, the Assembly noted that many Council of Europe member States (Albania, Croatia, the Czech Republic, Estonia, Finland, France, Georgia, Hungary, Italy, Latvia, Lithuania, the Republic of Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, the Slovak Republic, Spain, Sweden, Switzerland and the United Kingdom) have passed laws to protect whistle-blowers either generally or at least in certain fields.

After noting that on 16 April 2019 the European Parliament had approved a proposal for a directive aimed at improving the situation of whistle-blowers in all of its member States, the Resolution further emphasised that the Council of Europe member States which were not, or not yet, members of the European Union (hereafter "the EU") also have a strong interest in drawing on the draft directive with a view to adopting or updating legislation in accordance with these new standards.

57. On 30 April 2014 the Committee of Ministers adopted Recommendation CM/Rec (2014)7 on the protection of whistleblowers, which states:

"...

Recognising that individuals who report or disclose information on threats or harm to the public interest ('whistleblowers') can contribute to strengthening transparency and democratic accountability;

...

For the purposes of this recommendation and its principles:

... 'whistleblower' means any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector;

...

Personal scope

3. The personal scope of the national framework should cover all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not.

4. The national framework should also include individuals whose work-based relationship has ended and, possibly, where it is yet to begin in cases where information concerning a threat or harm to the public interest has been acquired during the recruitment process or other pre-contractual negotiation stage.

...

14. The channels for reporting and disclosures comprise:

- reports within an organisation or enterprise (including to persons designated to receive reports in confidence);

- reports to relevant public regulatory bodies, law enforcement agencies and supervisory bodies;

- disclosures to the public, for example to a journalist or a member of parliament.

The individual circumstances of each case will determine the most appropriate channel.

...

21. Whistleblowers should be protected against retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer. Forms of such retaliation might include dismissal, suspension, demotion, loss of promotion opportunities, punitive transfers and reductions in or deductions of wages, harassment or other punitive or discriminatory treatment.

22. Protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy.

...

24. Where an employer has put in place an internal reporting system, and the whistleblower has made a disclosure to the public without resorting to the system, this may be taken into consideration when deciding on the remedies or level of protection to afford to the whistleblower.

..."

The Explanatory Memorandum to this Recommendation states:

"...

31. It is the *de facto* working relationship of the whistleblower, rather than his or her specific legal status (such as employee) that gives a person privileged access to knowledge about the threat or harm to the public interest. Moreover, between member States, the legal description of individuals in employment or in work can vary and likewise their consequent rights and obligations. Furthermore, it was considered preferable to encourage member States to adopt an expansive approach to the personal scope of the recommendation. For these reasons it was decided to describe the personal scope by reference to the person's 'work-based relationship'...

..."

### *3. The European Directive on the protection of persons who report breaches of European Union law*

58. Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law was adopted on 23 October 2019. The Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 17 December 2021.

The Directive lays down common minimum standards for the protection of persons reporting breaches of European Union law in a range of areas, such as public procurement, financial services, prevention of money laundering and terrorist financing, product safety and compliance, transport safety, protection of the environment, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data, and security of network and information systems.

The relevant provisions of this Directive read as follows:

> "The European Parliament and the Council of the European Union ...
>
> ...
>
> Whereas:
>
> ...
>
> (32) To enjoy protection under this Directive, reporting persons should have reasonable grounds to believe, in light of the circumstances and the information available to them at the time of reporting, that the matters reported by them are true. That requirement is an essential safeguard against malicious and frivolous or abusive reports as it ensures that those who, at the time of the reporting, deliberately and knowingly reported wrong or misleading information do not enjoy protection. At the same time, the requirement ensures that protection is not lost where the reporting person reported inaccurate information on breaches by honest mistake. Similarly, reporting persons should be entitled to protection under this Directive if they have reasonable grounds to believe that the information reported falls within its scope. The motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection.
>
> ...
>
> (33) ... it is necessary to protect public disclosures, taking into account democratic principles such as transparency and accountability, and fundamental rights such as freedom of expression and the freedom and pluralism of the media, whilst balancing the interest of employers to manage their organisations and to protect their interests, on the one hand, with the interest of the public to be protected from harm, on the other, in line with the criteria developed in the case law of the ECHR.
>
> ...
>
> (43) Effective prevention of breaches of Union law requires that protection is granted to persons who provide information necessary to reveal breaches which have already taken place, breaches which have not yet materialised, but are very likely to take place, acts or omissions which the reporting person has reasonable grounds to consider as breaches, as well as attempts to conceal breaches. For the same reasons, protection is

justified also for persons who do not provide positive evidence but raise reasonable concerns or suspicions. At the same time, protection should not apply to persons who report information which is already fully available in the public domain or unsubstantiated rumours and hearsay.

...

(46) Whistleblowers are, in particular, important sources for investigative journalists. Providing effective protection to whistleblowers from retaliation increases legal certainty for potential whistleblowers and thereby encourages whistleblowing also through the media. In this respect, protection of whistleblowers as journalistic sources is crucial for safeguarding the 'watchdog' role of investigative journalism in democratic societies.

(47) For the effective detection and prevention of breaches of Union law, it is vital that the relevant information reaches swiftly those closest to the source of the problem, most able to investigate and with powers to remedy it, where possible. As a principle, therefore, reporting persons should be encouraged to first use internal reporting channels and report to their employer, if such channels are available to them and can reasonably be expected to work. That is the case, in particular, where reporting persons believe that the breach can be effectively addressed within the relevant organisation, and that there is no risk of retaliation. As a consequence, legal entities in the private and public sector should establish appropriate internal procedures for receiving and following up on reports. Such encouragement also concerns cases where such channels were established without it being required by Union or national law. This principle should help foster a culture of good communication and corporate social responsibility in organisations, whereby reporting persons are considered to significantly contribute to self-correction and excellence within the organisation.

...

**Article 2**

Material scope

"1. This Directive lays down common minimum standards for the protection of persons reporting the following breaches of Union law:

(a) breaches falling within the scope of the Union acts set out in the Annex that concern the following areas:

(i) public procurement;

(ii) financial services, products and markets, and prevention of money laundering and terrorist financing;

(iii) product safety and compliance;

(iv) transport safety;

(v) protection of the environment;

(vi) radiation protection and nuclear safety;

(vii) food and feed safety, animal health and welfare;

(viii) public health;

(ix) consumer protection;

(x) protection of privacy and personal data, and security of network and information systems;

(b) breaches affecting the financial interests of the Union as referred to in Article 325 TFEU and as further specified in relevant Union measures;

(c) breaches relating to the internal market, as referred to in Article 26(2) TFEU, including breaches of Union competition and State aid rules, as well as breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

2. This Directive is without prejudice to the power of Member States to extend protection under national law as regards areas or acts not covered by paragraph 1."

**Article 3**

Relationship with other Union acts and national provisions

"1. Where specific rules on the reporting of breaches are provided for in the sector-specific Union acts listed in Part II of the Annex, those rules shall apply. The provisions of this Directive shall be applicable to the extent that a matter is not mandatorily regulated in those sector-specific Union acts.

2. This Directive shall not affect the responsibility of Member States to ensure national security or their power to protect their essential security interests. In particular, it shall not apply to reports of breaches of the procurement rules involving defence or security aspects unless they are covered by the relevant acts of the Union.

3. This Directive shall not affect the application of Union or national law relating to any of the following:

(a) the protection of classified information;

(b) the protection of legal and medical professional privilege;

(c) the secrecy of judicial deliberations;

(d) rules on criminal procedure.

4. This Directive shall not affect national rules on the exercise by workers of their rights to consult their representatives or trade unions, and on protection against any unjustified detrimental measure prompted by such consultations as well as on the autonomy of the social partners and their right to enter into collective agreements. This is without prejudice to the level of protection granted by this Directive."

**Article 4**

Personal scope

"1. This Directive shall apply to reporting persons working in the private or public sector who acquired information on breaches in a work-related context including, at least, the following:

(a) persons having the status of worker, within the meaning of Article 45(1) TFEU, including civil servants;

(b) persons having self-employed status, within the meaning of Article 49 TFEU;

(c) shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members, as well as volunteers and paid or unpaid trainees;

(d) any persons working under the supervision and direction of contractors, subcontractors and suppliers.

2. This Directive shall also apply to reporting persons where they report or publicly disclose information on breaches acquired in a work-based relationship which has since ended.

3. This Directive shall also apply to reporting persons whose work-based relationship is yet to begin in cases where information on breaches has been acquired during the recruitment process or other pre-contractual negotiations."

...

**Article 6**

Conditions for protection of reporting persons

"1. Reporting persons shall qualify for protection under this Directive provided that:

(a) they had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive; and

(b) they reported either internally in accordance with Article 7 or externally in accordance with Article 10, or made a public disclosure in accordance with Article 15.1

..."

**Article 7**

Reporting through internal reporting channels

"1. As a general principle and without prejudice to Articles 10 and 15, information on breaches may be reported through the internal reporting channels and procedures provided for in this Chapter.

2. Member States shall encourage reporting through internal reporting channels before reporting through external reporting channels, where the breach can be addressed effectively internally and where the reporting person considers that there is no risk of retaliation.

..."

**Article 10**

Reporting through external reporting channels

"Without prejudice to point (b) of Article 15(1), reporting persons shall report information on breaches using the channels and procedures referred to in Articles 11 and 12, after having first reported through internal reporting channels, or by directly reporting through external reporting channels.

..."

**Article 15**

Public disclosures

"1. A person who makes a public disclosure shall qualify for protection under this Directive if any of the following conditions is fulfilled:

(a) the person first reported internally and externally, or directly externally in accordance with Chapters II and III, but no appropriate action was taken in response to the report within the timeframe referred to in point (f) of Article 9(1) or point (d) of Article 11(2); or

(b) the person has reasonable grounds to believe that:

(i) the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or

(ii) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.

2. This Article shall not apply to cases where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information.

..."

**Article 19**

Prohibition of retaliation

"Member States shall take the necessary measures to prohibit any form of retaliation against persons referred to in Article 4, including threats of retaliation and attempts of retaliation ...

..."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

59. The applicant submitted that his criminal conviction amounted to a disproportionate interference with his right to freedom of expression as provided for by Article 10 of the Convention, which reads 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. ...

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."

## A. The Chamber judgment

60. In its judgment of 11 May 2021, the Chamber began by holding that the applicant could be regarded, in principle, as a whistle-blower for the purposes of the Court's case-law. It then sought to establish whether the national courts had complied with the various criteria developed in the *Guja* judgment (*Guja v. Moldova* [GC], no. 14277/04, §§ 74-95, ECHR 2008), namely: the availability of alternative channels for making the disclosure, the public interest in the disclosed information, the applicant's good faith, the authenticity of the disclosed information, the damage caused to the employer and the severity of the penalty. Noting that there was no dispute between the parties with regard to the first four criteria, it concluded that only the criteria concerning, firstly, the balancing of the public interest in the information disclosed against the damage caused to the employer and, secondly, the severity of the penalty, were in issue in this case.

61. Thus, the Chamber had regard to the weighing of the competing interests undertaken by the domestic courts. In this connection, it returned to the Court of Appeal's finding that the documents disclosed by the applicant had not "provided essential, new and previously unknown information". Commenting on these qualifying adjectives, the Chamber considered that the Court of Appeal had not added new criteria to those established by the Court's case-law in this area, as these three qualifying criteria were "on the contrary absorbed in the Court of Appeal's exhaustive reasoning ... concerning the balancing of the private and public interests at stake". In so doing, it described the terms as "clarifications which, in other circumstances, might be considered too narrow, but which in the present case served, together with the other elements taken into account by the Court of Appeal, [in] reaching the conclusion that the applicant's disclosures lacked sufficient interest to counterbalance the harm suffered by PwC" (§ 109 of the Chamber judgment). The Chamber found that the Court of Appeal had confined itself to examining the evidence carefully, in the light of the criteria set out in the Court's case-law, concluding from it that the documents disclosed by the applicant were not of sufficient interest, in view of the damage caused by their disclosure, to justify acquitting him.

62. With regard to the criterion concerning the severity of the penalty, the Chamber considered that the fine imposed on the applicant had been relatively mild and did not have a genuinely chilling effect on the exercise of the freedom of expression of the applicant or of other employees (§ 111 of the Chamber judgment).

63. Holding that the domestic courts had struck a fair balance between, on the one hand, the need to protect the rights of the applicant's employer and,

on the other, the need to protect the applicant's freedom of expression, the Chamber concluded, by five votes to two, that there had been no violation of Article 10 of the Convention.

## B. The parties' submissions

### *1. The applicant's submissions*

64. The applicant argued that the domestic courts had applied the criteria identified in the *Guja* judgment (cited above, hereafter "the *Guja* criteria") before concluding from them that he was not a whistle-blower and refusing him the protection attached to that status. In this regard, he stressed that although the Chamber had initially granted him whistle-blower status before assessing whether the refusal to allow him to benefit from the protection regime entailed by that status had arisen from a correct application of the "*Guja* criteria", the Court of Appeal had, conversely, first verified whether the constituent elements for the protection regime for whistle-blowers had been met, before concluding that he did not have whistle-blower status.

65. The applicant submitted that, in addition to the need to clarify the order in which these questions were to be examined, it was also necessary to specify the conditions for the balancing exercise that was to be conducted in relation to the competing interests when implementing the "*Guja* criteria". Generally speaking, he criticised the Court of Appeal for having applied the "*Guja* criteria" in isolation. Relying in this connection on the dissenting opinion attached to the Chamber judgment, he submitted that the weighing-up of the competing interests as part of the "fifth criterion of the *Guja* case-law" ought not to be conducted in isolation, but in the light of a global analysis, based on Article 10, which took account of all the relevant criteria.

66. With regard, firstly, to the damage caused by the impugned revelations, to be taken into account in the balancing exercise, the applicant reviewed the development of the Court's case-law and argued that this concept had evolved towards that of "detriment to the employer" (he referred to *Heinisch v. Germany*, no. 28274/08, §§ 88-90, ECHR 2011 (extracts), and *Gawlik v. Liechtenstein*, no. 23922/19, § 79, 16 February 2021). The applicant stressed the transformation of the criterion as initially established by the Court, which, in his view, included the need to maintain public confidence in the State. In this connection, the applicant referred to the Court's findings in the cases of *Bucur and Toma v. Romania* (no. 40238/02, §§ 114-15, 8 January 2013), *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* ([GC], no. 17224/11, § 80, 27 June 2017) and *Gawlik* (cited above, § 79). He emphasised the consequences of applying the criterion of "detriment to the employer" to a scenario in which the whistle-blower was a private-sector employee. In the present case, this had led to a balancing of the public interest in knowing the impugned disclosure

against the specific interest of a given company, which, in the applicant's view, amounted to a potentially dangerous drift.

67. In his view, such an interpretation of the "*Guja* criteria" encouraged the idea that the interests being balanced were of equal importance (whatever their respective weight) and was likely to lead to a conflict of interests opposing, on the one hand, the applicant's freedom of expression against the employer's reputation on the other. He argued against such a change, which, in his view, was tantamount to moving from a balancing exercise between different interests to resolving a conflict between the rights protected under Articles 10 and 8 of the Convention.

68. With regard, secondly, to the public interest in the disclosed information, which was also to be taken into consideration in the balancing exercise, the applicant argued that the Court of Appeal had contradicted itself by initially acknowledging that such an interest existed, before ruling that the disclosed documents had not provided "essential, new and previously unknown" information. By adding these new requirements, which had the effect of restricting the effective protection of freedom of expression, it had broadened the domestic authorities' margin of appreciation. Such "clarifications" to the concept of "information of public interest" were all the less relevant given that, according to the Court's case-law, the existence of a public debate on a certain matter spoke in favour of further disclosures of information which would contribute to that debate (he referred to *Dammann v. Switzerland*, no. 77551/01, § 54, 25 April 2006).

69. The applicant also challenged the Chamber's finding (§ 109 of its judgment) as to the characteristics that the disclosed information should have possessed to justify the detriment caused to the company by its disclosure. Given that his contribution to the "Luxleaks" debate was not considered decisive in assessing the public-interest criterion, it was unclear to him how his involvement in causing damage to his employer's reputation could be regarded as such.

70. The applicant then returned to the specific features of the present case, which, in his view, were linked to the fact that he worked in the private sector. Analysing the Court's case-law, he argued that the Court of Appeal's "partial, inexact and specious" application of the *Guja* case-law had resulted in a situation where the balance between the public interest in being informed of the disclosures and the whistle-blower's freedom of expression on the one hand, and a company's commercial reputation on the other, had been swung in favour of the company. He submitted that this amounted to a complete reversal of the approach adopted since the *Steel and Morris v. the United Kingdom* judgment (no. 68416/01, § 95, ECHR 2005-II).

71. He emphasised that, having been sanctioned once by his employer PwC (which dismissed him), he had also been sanctioned by the State, specifically by the criminal courts (he referred to *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, 13 November 2008, and *Bucur and Toma*, cited

above). He stressed the risk of extending application of the criterion of detriment sustained by the employer to the case of whistle-blowing in the context of a private-sector employment relationship. For this reason, he suggested that, with regard to whistle-blowers in the private sector, the criterion of damage sustained by the employer be reserved only to those cases where a professional sanction had been imposed and where the proportionality of that measure was being debated.

72. In the present case, he emphasised that by having accepted that the applicant's criminal conviction (further to his dismissal) could be justified because his employer had suffered damage to its reputation, the Chamber judgment had succeeded in nullifying the protection of whistle-blowers.

73. The applicant also recommended that the *Guja* case-law be developed, by abandoning the criterion of detriment to the employer. In his opinion, the main risk currently threatening whistle-blowers was less disciplinary in nature (reprimand or dismissal) than criminal, as shown by the cases of Edward Snowden, Julian Assange or Chelsea Manning. He argued that such a development in the case-law would be consistent with the European Union Directive on the protection of persons who report breaches of Union law (see paragraph 58 above and, hereafter, "the European Directive"), which made no link between protection of whistle-blowers and the harm caused to the employer. In this connection, the applicant pointed out that a large number of Council of Europe member States would be required to transpose this Directive, and their national courts would be required to apply it, so that harmonisation of the applicable law in this area was desirable.

74. Lastly, the applicant emphasised the need for the Court to move beyond the *Guja* case-law, by drawing up a definition of whistle-blowing and a genuine status for whistle-blowers. In this connection, he noted, referring to Article L.271-1 of the Luxembourg Labour Code and section 38-12 of the Financial Sector Act (Law of 5 May 1993), that the appliable texts at the relevant time enshrined the existence of a whistle-blower status, without defining it or defining the criteria for application of the legal regime attached to recognition of this status. He also submitted arguments in favour of a system of presumption in favour of persons who came within the category of whistle-blowers, whom he described as "watchdogs" of democracy.

75. As to the definition of a whistle-blower, the applicant referred to those given in Resolution 1729 (2010) on the protection of "whistle-blowers" of the Parliamentary Assembly of the Council of Europe (see paragraph 55 above; hereafter, "Resolution no. 1729(2010)"; in the Recommendation of the Committee of Ministers of the Council of Europe of 30 April 2014 (see paragraph 57 above; hereafter, "Recommendation (2014)7"); and in Report A/70/361 of 8 September 2015 by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (see paragraph 54 above; hereafter, "the UN Special Rapporteur"), while

calling for a definition by the Court, for the purposes of Article 10 of the Convention, which would be less theoretical.

76. Based on an analysis of the Court's case-law, he proposed the following definition of a whistle-blower: "a person ..., who complains of having been punished, by his/her employer and/or the State ... for having breached the work-related duty of loyalty, reserve and discretion, by disclosing documented information ... obtained in the context of his or her employment, which he/she considers himself/herself ethically bound ... to share with persons outside their employment, ... and which reveals the existence of moral or criminal wrongdoing which is likely to harm the public interest". The applicant emphasised that it was the public interest attached to awareness of a certain type of information which was substantively protected through formal protection of the person bringing this information to the public's attention.

77. With regard to the nature of the oversight to be exercised in this area, the applicant stressed that there was no reason why the principle of subsidiarity, although expressly enshrined by Protocol No. 15, would prevent the Court from carrying out a review, both procedural and substantive, of the grounds and criteria used by the domestic courts in applying the Convention. In this connection, he argued that the Court of Appeal had not respected the manner in which the protection of whistle-blowers, as the *lex specialis*, interacted with the *lex generalis* constituted by Article 10, and submitted that if the domestic courts did not fulfil the role incumbent on them under the Convention system, the Court was then required itself to weigh up the interests at stake in order to re-establish justice and the law.

78. With regard to the balancing exercise conducted by the domestic courts in the present case, the applicant emphasised that it was not enough to refer as a matter of form to the criteria identified by the Court; it was also necessary to apply them correctly. Citing the cases of *Perinçek v. Switzerland* ([GC], no. 27510/08, ECHR 2015 (extracts)) and *Aksu v. Turkey* ([GC], nos. 4149/04 and 41029/04, ECHR 2012), the applicant pointed out that "[if] the balance struck by the national judicial authorities is unsatisfactory, in particular because the importance or the scope of one of the fundamental rights at stake was not duly considered, the margin of appreciation accorded to the decisions of the national courts will be a narrow one".

79. According to the applicant, in the present case the national authorities had complied with neither the requirements of the *Von Hannover v. Germany (no. 2)* case-law ([GC], nos. 40660/08 and 60641/08, ECHR 2012), nor those of the *Axel Springer AG v. Germany (no. 2)* case-law (no. 48311/10, 10 July 2014), particularly with regard to assessment of the chilling effect of the contested sanction. This fact ought to lead the Court, in keeping with the principle of subsidiarity, to substitute its assessment for that of the national courts.

80. The applicant concluded by arguing that, in the circumstances of the present case, to accept the Court of Appeal's findings would seriously undermine the effectiveness of the protection guaranteed to whistle-blowers under Article 10 of the Convention.

*2. The Government's submissions*

81. The Government considered the applicant's position as a desire to see the Court amend its case-law on whistle-blowers so that persons claiming the protection attached to this status would no longer have to establish that the public interest in the information disclosed by them outweighed the damage sustained by the employer as a result of that disclosure. The Government did not accept the applicant's claims in this respect and subscribed to the Chamber judgment in the present case (particularly at §§ 95-99 and 109-111).

82. Relying on the national margin of appreciation, the Government submitted that the domestic courts had scrupulously complied with the requirements identified in the Court's case-law with regard to the protection of whistle-blowers.

83. Citing the case of *Jersild v. Denmark* (23 September 1994, § 31, Series A no. 298), the Government submitted that the Court had circumscribed the scope of its review of the necessity, in a democratic society, of an interference under Article 10 of the Convention. Noting, moreover, that the present case concerned a conflict between the applicant's right to impart information and his employer's right to protection of its reputation, they referred to the *Von Hannover (no. 2)* judgment (cited above, § 106). With regard to the specific requirements identified under Article 10 of the Convention once an individual asserting the right to disclose information had claimed whistle-blower status (referring to *Guja*, cited above, §§ 73-76), the Government submitted that in the present case the domestic courts had correctly applied the "*Guja* criteria", particularly in respect of the fifth criterion relating to the balancing exercise to be conducted between the public interest in disclosure of the information and the detriment to the employer.

84. The Government also argued that the body of case-law developed by the Court was sufficiently clear, both in terms of the principles laid down and the assessment criteria defined for their implementation, to provide the national authorities with the necessary guidance for the proper application of the relevant standards of protection and for an accurate assessment of the respective weight of the rights and interests at stake in a given case. They argued that the "*Guja* criteria" which, moreover, had been confirmed in recent cases examined by the Court provided the domestic authorities with an adequate framework to enable them to ensure the protection of whistle-blowers' freedom of expression (they referred, for example, to *Norman v. the United Kingdom*, no. 41387/17, §§ 83 et seq., 6 July 2021).

85. The Government further submitted that only the fifth "*Guja* criterion", relating to the balancing of the public interest in the disclosed information

with regard to the resultant damage sustained by the employer, was under discussion before the Grand Chamber, and specified that their observations were confined to how that criterion had been applied. They stated that, in finding that the disclosures in question were of limited public interest and that there had been no compelling reason for the applicant, after A.D.'s disclosure, to commit a further breach of the law in appropriating and disclosing confidential documents (§ 33 of the Chamber judgment), the domestic courts had conducted a balancing exercise which corresponded to the review criteria identified in the *Guja* judgment. In so doing, they had held that, although the information disclosed by the applicant had a certain public interest, this interest had nonetheless been very modest, in that it:

– was limited to 16 documents, including 14 tax returns and two covering letters, as compared to the 45,000 pages of confidential documents (including 20,000 pages of tax documents corresponding, in particular, to 538 ATA files) previously disclosed by A.D.;

– did not contain any revelation concerning the tax optimisation technique;

– had not been selected by the applicant in order to supplement the ATAs already in the possession of the journalist E.P. following the previous disclosures by A.D., but solely on the basis of how well known the relevant taxpayers were;

– had been used in a television programme on tax evasion in order to demonstrate that the multinational company group A., domiciled in Luxembourg, had declared a turnover there that was, for the most part, not generated by commercial activity in that country and that a corporate group, A.M., had used inter-group loans enabling it to obtain tax deductions (§ 34 of the Chamber judgment); and,

– was not fundamentally new (in contrast to A.D.'s disclosures about the practice of ATAs), since it merely illustrated standard practices in the area of asset-structuring by multinational companies, which had in principle been known for a long time.

86. The Government further emphasised that the disclosure, which had been made in breach of the professional secrecy by which the applicant was bound as an employee of an auditing company, in the same way as an employee of a doctor or lawyer, had infringed three categories of rights and interests:

– those of his employer;

– those of the persons who had entrusted that employer with the disclosed data;

– the public interest guaranteed by professional secrecy for the purpose of protecting personal data.

The fact that the applicant's employer had assessed the damage sustained at only one symbolic euro, which was a common claim in Luxembourg, did not alter these considerations. In the Government's submission, it could not

be disputed that the victim of a violation of a right guaranteed by the Convention might prefer to obtain recognition of that violation rather than financial compensation for the damage, which, furthermore, was difficult to quantify in the present case.

87. Given all these considerations, the Government concluded that the Court of Appeal had not exceeded the margin of appreciation afforded to the national authorities in finding that the damage sustained by the employer, assessed in the specific context of the so-called *Luxleaks* case, outweighed the public interest in the disclosure of the relevant tax returns. They concluded that the applicant's conviction and the imposition of a criminal fine for breach of professional secrecy could not amount to a violation of Article 10 of the Convention.

88. Turning more specifically to the alleged public interest in the disclosure of the information in issue, the Government submitted that the domestic courts had not interpreted it restrictively. They refuted the applicant's analysis that the domestic courts had created a new criterion by requiring the disclosure of "new information". Departing on this point from the authors of the joint dissenting opinion attached to the Chamber judgment, they argued that the provision of "essential, new and [previously] unknown information" was not a condition for establishing the existence of a public interest in its disclosure, but was rather one element, among others, for assessing the existence of such a public interest in this specific case. They endorsed the findings made on this point in the Chamber judgment (§§ 31, 109-110).

89. According to the Government, the public interest in disclosure could not systematically prevail over the harm done to the rights and interests of others, otherwise professional secrecy and the right to protection of reputation would be rendered meaningless. In their view, a meagre contribution to the public debate such as that made by the impugned disclosure in the present case could not justify the serious damage to the reputation of the applicant's employer, in breach, moreover, of the professional secrecy imposed by the law in order to protect the rights of others. They argued that the concept of "the public interest of the information disclosed", a precondition to enjoying additional protection, presupposed that a disclosure made in breach of the secrecy imposed by law was justified by the inherent value of the information revealed and its contribution to the public debate. They submitted that the information disclosed in the present case could not be described as illustrating the issues raised by the *Luxleaks* case, in so far as the tax returns disclosed by the applicant were not directly related to the practice of ATAs, challenged by A.D. and E.P., who had been acquitted.

90. More generally, the Government contested the applicant's claims that the protection afforded to an initial whistle-blower should subsequently be extended to any person who made further disclosures in the same general context. They challenged the idea that any "illustration" of the elements of a

debate of general interest should be covered by the protection afforded to whistle-blowers. In the Government's view, the care taken by the Court in identifying the numerous cumulative criteria that must be met for a person to qualify as a whistle-blower illustrated the exceptional nature of this additional protection. The development called for by the applicant would run counter to the limits which, in their view, ought to be placed on the right to impart information, particularly in areas which could prove sensitive for States and which were frequently at the heart of perfectly legitimate public debates, as was the case with regard to the Grand Duchy of Luxembourg's tax policy. It would also weaken the scope of the legal obligations of secrecy and confidentiality, imposed with a view to protecting the rights of others, as was the case, in particular, for company auditors. It would also affect the contractual relations between companies operating in this sector and their clients, as no contracting parties would ever be safe from disclosures concerning not only matters that could reasonably be considered as something that warranted being brought to the public's attention, on account of their unlawful nature or the harm they represented for the public interest, but potentially also any confidential matter relating to the business life or personal assets of the clients or the director of the company, the employer or the client.

91. In that connection, the Government emphasised that the confidentiality to which the applicant had been bound did not arise solely from the contractual stipulations binding him to his employer, but resulted from an obligation imposed by law on company auditors. They noted that he had thus been in a situation comparable to that of a doctor or lawyer who held information about a patient or client and chose to reveal it, in breach of his or her duty of professional confidentiality. The professional confidentiality imposed on auditors was intended to protect their clients' data, that is, the rights of others. As the Court had held, "the nature and extent of loyalty owed by an employee in a particular case has an impact on the weighing of the employee's rights and the conflicting interests of the employer" (referring to *Heinisch*, cited above, § 64). In the Government's view, this was indeed a conflict of rights and they considered it inconceivable, in the light of the Court's settled case-law and in particular the *Von Hannover (no. 2)* judgment (cited above), that the protection of the applicant's rights should be regarded as more legitimate *a priori* than protection of his employer's rights.

92. Assuming that the obligation of confidentiality on civil servants could be imposed with greater force than that established, even by law, in private-sector employment relationships, the Government submitted that, equally, the public interest in information disclosed by a civil servant was, *a priori*, greater than the public interest arising from the disclosure of private information. Thus, the Government disputed the applicant's suggestion that the disclosure of information obtained in the context of a private-sector

employment relationship should imply a less strict compliance with the criteria established by the Court's case-law.

93. Furthermore, the Government pointed out that, by virtue of the principle of subsidiarity, it was not for the Court to substitute its assessment for that of the domestic courts unless there were weighty grounds for doing so. In that connection, they noted that domestic courts' decisions were adopted after the examination of case files that were often voluminous, adversarial proceedings that were frequently wide-ranging, and in-depth investigations. At national level, the facts in issue could thus be assessed by four judicial bodies, which had had to evaluate all the elements of the case and weigh up the rights and interests at stake in the light of the Court's case-law. The Government further noted that the self-restraint exercised by the Court under the principle of subsidiarity was also respected in the domestic system, for similar reasons, by the Court of Cassation (see § 40 of the Chamber judgment).

94. Calling this restraint into question could give rise to errors of assessment and expose the Court to the risk of ruling on the basis of insufficient evidence, thereby leading to conclusions that were inconsistent with the evidence in the case file. The Government pointed out that, to avoid such a danger, the Court's review should be confined to assessing the compatibility with its case-law of the reasoning given for the domestic courts' decisions, while refraining from reviewing the merits of the reasons given, provided they were adequate and free from contradiction. In the present case, the Government submitted that the domestic courts had identified and weighed up the rights and interests at issue, having regard to the criteria established in the Court's case-law. Although, in the light of all the criteria laid down by the Court, it had been impossible to grant the applicant whistle-blower status, these courts had taken account of his good faith and his motives, and had imposed only a very limited penalty compared with those potentially available under Luxembourg law. It followed that the Court, having regard to the national margin of appreciation afforded to the States, ought to conclude that there had been no violation of Article 10 of the Convention in the present case.

95. The Government also contested the applicant's analysis to the effect that European Directive 2019/1937 amounted to an extension of whistle-blower protection. They argued that although the Directive did not formally make the protection of whistle-blowers conditional on prior assessment of the damage caused to the official body or employer to which the person who disclosed the information was answerable, it could not however be inferred that it took no account at all of such damage. They submitted that this damage was taken into account not through a balancing of the competing interests, but through the conditions to which the Directive subjected the protection of whistle-blowers. The Government emphasised that this protection applied only in strictly defined cases, which they detailed

with reference to Articles 2, 3, 5, 6, 14 and 15 of the Directive. They argued that the conditions which the Directive imposed for an individual disclosing confidential information to be able to enjoy protection required that a series of complex criteria had to be met, relating to the subject matter of the information disclosed, the form of its disclosure (which could be public only where alternative forms of disclosure had yielded no results and in scenarios that were exhaustively set out) and the obligation to have regard to respect for various forms of secrecy (professional secrecy of doctors and lawyers, for example). They also asserted that the EU Parliament had ensured that competing interests were balanced, and referred in this respect to recital 33 of the Directive (see paragraph 58 above).

96. More generally, the Government considered that, in the absence of any rules contradicting or modifying the substance of the Court's case-law, the principles and criteria laid down therein provided a stable legal framework, guaranteeing a high level of protection for whistle-blowers, in a manner commensurate with their contribution to debates in the public interest. They submitted that the domestic courts' application of those criteria in the present case had demonstrated that same level of protection, stressing that only legitimate reasons, compatible with the Court's case-law, had led to the applicant being denied the benefit of that protection.

### C. Third-party submissions

#### *1. Maison des Lanceurs d'alerte (hereafter, "the MLA")*

97. The MLA argued that permitting domestic courts to examine the extent to which a disclosure included "essential, new and previously unknown information" in the context of review of the proportionality of breaches of Article 10 of the Convention would have serious implications for the effectiveness of whistle-blower protection. It emphasised both the legal uncertainty that these criteria were likely to cause and the practical impossibility for whistle-blowers to comply with these new criteria. They would lead to a situation where States no longer took responsibility regarding their obligations to investigate human-rights violations, in so far as it was often necessary for the alarm to be raised several times on the same subject before complaints were effectively dealt with by the public authorities. In this connection, MLA argued that resorting to media coverage was usually the necessary pre-condition for whistle-blowing to be effective, since long-term and far-reaching institutional changes could only be achieved by raising the alert in the mass media.

98. MLA referred to sociological research showing that the effectiveness of whistle-blowing protection systems depended on their intelligibility and predictability. It submitted, however, that requiring that the information disclosed be "essential, new and previously unknown" would be a source of considerable legal uncertainty for whistle-blowers and would reduce the

ability of "the watchdogs of democracy" to fulfil their function of fuelling public-interest debates. Furthermore, this would give credence to the idea that a public debate could be held instantaneously or frozen in time, whereas citizens' attitudes to issues of general interest evolved over time. Lastly, such a requirement would be totally unsuited to the profiles of whistle-blowers, in today's world of social networks.

99. MLA further stressed that the European Directive only required the whistle-blower to have reasonable grounds to believe that the information was true at the time of reporting (Article 6 § 1 of the Directive). It noted that international best practice demonstrated the existence of a standard of "reasonable belief" as to the authenticity of the information disclosed. More generally, it relied on the explanatory memorandum of the Directive (recital 43, see paragraph 58 above) to emphasise that the criteria for access to whistle-blower status should be sufficiently open so that any person likely to have reasonable suspicions could raise the alarm and obtain protection in this respect. MLA argued that to take account of the "newness" of the information would defeat the purpose of the Directive, which could present the national courts with the dilemma of having to choose between the application of Convention law and the application of EU law, leading to a weakening of the force and effectiveness of Convention law and of the Court's judgments.

*2. Media Defence*

100. Media Defence submitted that the issues to be determined in this case were likely to have a significant impact on how investigative journalism was conducted, particularly in a context in which journalistic sources were coming under increasing pressure throughout the territory of the member States of the Council of Europe. In this connection, Media Defence emphasised that whistle-blowers played an important role as journalistic sources by disclosing important information on a range of matters relating to the public interest. Any reduction in the level of protection available to them would, by extension, impact on the ability of the press to do its job. It referred to the terms of an OECD report[1] finding that "whistle-blower protection is the ultimate line of defence for safeguarding the public interest".

101. Media Defence relied in this respect on the European Directive, the Preamble to which stated that the protection of whistle-blowers as journalistic sources was crucial for safeguarding the 'watchdog' role of investigative journalism in democratic societies. By way of illustration, Media Defence pointed out that numerous cases of corruption and malfeasance had come to light in recent years because of whistle-blowers and referred to the disclosures of information concerning Facebook and Boeing, and to the

[1]Committing to Effective Whistleblower Protection, 16 March 2016.

Panama Papers. The inability of the press to obtain information from private entities reinforced, in its view, the importance of the information that whistle-blowers were likely to communicate.

102. Media Defence further stressed the importance of ensuring that whistle-blowers could count on a legal protection framework that was clear, coherent and precise. Any uncertainty in this area would inevitably have a chilling effect.

103. Lastly, while recognising that the duty of loyalty and discretion had to be taken into account in assessing whistle-blowing cases, Media Defence submitted that it should apply to a lesser degree where the disclosure of information was by a private-sector employee. It stressed that while the aim of the State was, or should be, the public good, the aim of a private enterprise remained that of profit.

*3. Whistleblower Netzwerk E.V. (WBN)*

104. WBN argued that the criterion of "essential, new and previously unknown" information was contrary to international protection standards and even to the Court's case-law. Application of this criterion would result in whistle-blowers losing the legal protection they currently enjoyed and would mark a break with the clear position adopted by the Court to date. This would lead to an *a posteriori* analysis of the situation replacing consideration of a whistle-blower's individual perspective *ex ante*, and would thus be a source of legal uncertainty for any whistle-blower.

105. According to WBN, although the "*Guja* criteria" required clarification to take account of and adapt to the constant increase in whistle-blowing cases, the fact remained that these criteria had for years provided a protection framework, which was a source of legal certainty.

106. WBN also emphasised the need to avoid placing the Court's case-law in conflict with the European Directive. In this connection, WBN described the differences which, in its view, existed between the Court's case-law and the Directive, noting in particular that the Directive refrained from imposing the preferential use of internal reporting and left it to the whistle-blower to choose the reporting channel that he or she deemed to be the most effective for disclosing information. WBN also stressed that, with regard to the whistle-blower's motivation, the Directive did not include any condition relating to his or her good faith.

107. Lastly, WBN referred to the joint dissenting opinion attached to the Chamber judgment and stressed that legal certainty was an essential dimension for the effectiveness of protection for whistle-blowers, who exposed themselves to very severe forms of retaliation, preventing them from earning their living correctly or supporting their families for years.

## D. The Court's assessment

108. Like the parties, for whom this point was undisputed, the Court considers that the applicant's conviction amounted to an interference with the exercise of his right to freedom of expression, as protected by Article 10 of the Convention. It further accepts – while noting that the parties did not raise this point – that the interference was prescribed by law and that it pursued at least one of the legitimate aims listed in Article 10 § 2 of the Convention, namely the protection of the reputation or rights of others, in particular the protection of PwC's reputation and rights.

109. The question that remains to be addressed is whether the interference was "necessary in a democratic society".

### *1. General principles established in the Court's case-law*

110. The basic principles concerning the necessity in a democratic society of interference with the exercise of freedom of expression are well established in the Court's case-law and have been summarised as follows in, among other authorities, *Hertel v. Switzerland* (25 August 1998, § 46, *Reports of Judgments and Decisions* 1998-VI), *Steel and Morris* (cited above § 87) and *Guja* (cited above, § 69):

> "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. In general, the 'need' for an interference with the exercise of the freedom of expression must be convincingly established. Admittedly, it is primarily for the national authorities to assess whether there is such a need capable of justifying that interference and, to that end, they enjoy a certain margin of appreciation. However, the margin of appreciation goes hand in hand with European supervision, embracing both the law and the decisions that apply it.
>
> In exercising its supervisory jurisdiction, the Court must examine the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it were 'relevant and sufficient'. In doing so, the Court has to satisfy itself that these authorities applied standards which were in conformity with the principles embodied in Article 10 and that, moreover, they relied on an acceptable assessment of the relevant facts."

**(a) General principles concerning the right to freedom of expression within professional relationships**

111. When considering disputes involving freedom of expression in the context of professional relationships, the Court has found that the protection of Article 10 of the Convention extends to the workplace in general (see *Kudeshkina v. Russia*, no. 29492/05, § 85, 26 February 2009, with the case-law references cited therein). It has also pointed out that this Article is not only binding in the relations between an employer and an employee when those relations are governed by public law but may also apply when they are governed by private law (see, *inter alia*, *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 59, ECHR 2011). Indeed, genuine and effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In certain cases, the State has a positive obligation to protect the right to freedom of expression, even against interference by private persons (ibid., § 59).

112. Protection of freedom of expression in the workplace thus constitutes a consistent and well-established approach in the case-law of the Court, which has gradually identified a requirement of special protection that, subject to certain conditions, ought to be available to civil servants or employees who, in breach of the rules applicable to them, disclose confidential information obtained in their workplace. Thus, a body of case-law has been developed which protects "whistle-blowers", although the Court has not specifically used this terminology. In the *Guja* judgment (cited above), the Court identified for the first time the review criteria for assessing whether and to what extent an individual (in the given case, a public official) divulging confidential information obtained in his or her workplace could rely on the protection of Article 10 of the Convention. It also specified the circumstances in which the sanctions imposed in response to such disclosures could interfere with the right to freedom of expression and amount to a violation of Article 10 of the Convention.

113. The criteria identified by the Court (see *Guja*, cited above, §§ 72-78) are set out below:

> "... In this respect the Court notes that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.
>
> ...
>
> In the light of the duty of discretion referred to above, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be

disclosed to the public ... In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover.

In determining the proportionality of an interference with a civil servant's freedom of expression in such a case, the Court must also have regard to a number of other factors. In the first place, particular attention shall be paid to the public interest involved in the disclosed information. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest ...

The second factor relevant to this balancing exercise is the authenticity of the information disclosed ... Moreover, freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable ...

On the other side of the scales, the Court must weigh the damage, if any, suffered by the public authority as a result of the disclosure in question and assess whether such damage outweighed the interest of the public in having the information revealed... In this connection, the subject matter of the disclosure and the nature of the administrative authority concerned may be relevant ...

The motive behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not. For instance, an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection ... It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet, means of remedying the wrongdoing was available to him or her.

Lastly, in connection with the review of the proportionality of the interference in relation to the legitimate aim pursued, attentive analysis of the penalty imposed on the applicant and its consequences is required ..."

114. The six criteria identified by the *Guja* judgment are therefore as follows:

- whether or not alternative channels for the disclosure were available;
- the public interest in the disclosed information;
- the authenticity of the disclosed information;
- the detriment to the employer;
- whether the whistle-blower acted in good faith; and
- the severity of the sanction.

115. In the subsequent cases brought before it involving the disclosure of confidential information by public-sector employees, the Court based its assessment on this set of criteria (see, *inter alia*, *Bucur and Toma*, cited above, and *Gawlik*, cited above). These criteria were also applied to a dispute arising in the context of private-law labour relations, where the employer was a State-owned company providing services in the sector of institutional care (see *Heinisch*, cited above, §§ 71-92).

116. The protection regime for the freedom of expression of whistle-blowers is likely to be applied where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large (see *Guja*, cited above, § 72, and *Heinisch*, cited above, § 63). Nonetheless, employees owe to their employer a duty of loyalty, reserve and discretion (see, for example, *Heinisch*, cited above, § 64), which means that regard must be had, in the search for a fair balance, to the limits on the right to freedom of expression and the reciprocal rights and obligations specific to employment contracts and the professional environment (see, among other authorities, *Palomo Sánchez and Others*, cited above, § 74, and *Rubins v. Latvia*, no. 79040/12, § 78, 13 January 2015).

117. Admittedly, the mutual trust and good faith which ought to prevail in the context of an employment contract do not imply an absolute duty of loyalty towards the employer or a duty of discretion to the point of subjecting the worker to the employer's interests. Nonetheless, the duty of loyalty, reserve and discretion constitutes an essential feature of this special protection regime (see *Heinisch*, cited above, § 64). Where no issue of loyalty, reserve and discretion arises, the Court does not enquire into the kind of issue which has been central in the case-law on whistle-blowing. In such situations, it is not therefore required to verify whether there existed any alternative channels or other effective means for the applicants to remedy the alleged wrongdoing (such as disclosure to the person's superior or other competent authority or body) which the applicants intended to uncover (see *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 80).

118. Moreover, the Court has held that the disclosures made by a civil servant who did not have privileged or exclusive access to, or direct knowledge of, information, who did not appear to be bound by secrecy or discretion with regard to his employment service and who did not appear to have suffered any repercussions at his workplace as a consequence of the disclosures in question, could not be held to constitute whistle-blowing (see *Wojczuk v. Poland*, no. 52969/13, §§ 85-88, 9 December 2021).

119. In line with the Committee of Ministers' Recommendation (2014)7 on the protection of whistleblowers (principle 3 and the Explanatory Memorandum thereto, § 31; see paragraph 57 above), the Court considers that it is the *de facto* working relationship of the whistle-blower, rather than his or her specific legal status (such as employee), which is decisive. The protection enjoyed by whistle-blowers under Article 10 of the Convention is based on the need to take account of characteristics specific to the existence of a work-based relationship: on the one hand, the duty of loyalty, reserve and discretion inherent in the subordinate relationship entailed by it, and, where appropriate, the obligation to comply with a statutory duty of secrecy; on the other, the position of economic vulnerability *vis-à-vis* the person, public

institution or enterprise on which they depend for employment and the risk of suffering retaliation from the latter.

**(b) The *Guja* criteria and the procedure for applying them**

120. The Court, which attaches importance to the stability and foreseeability of its case-law in terms of legal certainty, has, since the *Guja* judgment, consistently applied the criteria enabling it to assess whether and, if so, to what extent, an individual who discloses confidential information obtained in the context of an employment relationship could rely on the protection of Article 10 of the Convention. Nonetheless, the Court is fully conscious of the developments which have occurred since the *Guja* judgment was adopted in 2008, whether in terms of the place now occupied by whistle-blowers in democratic societies and the leading role they are liable to play by bringing to light information that is in the public interest, or in terms of the development of the European and international legal framework for the protection of whistle-blowers (see paragraphs 54-58 above). In consequence, it considers it appropriate to grasp the opportunity afforded by the referral of the present case to the Grand Chamber to confirm and consolidate the principles established in its case-law with regard to the protection of whistle-blowers, by refining the criteria for their implementation in the light of the current European and international context.

*(i) The channels used to make the disclosure*

121. The first criterion concerns the reporting channel or channels used to raise the alert. On numerous occasions since the *Guja* judgment, the Court has had occasion to emphasise that priority should be given to internal reporting channels. Disclosure should be made in the first place, in so far as possible, to the person's superior or other competent authority or body. "It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public" (see *Guja*, cited above, § 73). The internal hierarchical channel is, in principle, the best means for reconciling employees' duty of loyalty with the public interest served by disclosure. Thus, the Court took the view that a whistle-blowing situation was not at issue where an applicant had failed to report the matter to his superiors despite being aware of the existence of internal channels for disclosure and had not provided convincing explanations on this point (see *Bathellier v. France* (dec.), no. 49001/07, 12 October 2010, and *Stanciulescu v. Romania (no. 2)* (dec.), no. 14621/06, 22 November 2011).

122. However, this order of priority between internal and external reporting channels is not absolute in the Court's case-law. Such internal reporting mechanisms have to exist, and they must function properly (see *Heinisch*, cited above, § 73). The Court has accepted that certain circumstances may justify the direct use of "external reporting". This is the

case, in particular, where the internal reporting channel is unreliable or ineffective (see *Guja*, cited above, §§ 82-83, and *Heinisch*, cited above, § 74), where the whistle-blower is likely to be exposed to retaliation or where the information that he or she wishes to disclose pertains to the very essence of the activity of the employer concerned.

123. The Court also notes that in *Gawlik* (cited above, § 82), it left open the question whether or not the applicant was obliged to make use in the first instance of all the internal reporting channels, referring in that regard to the guiding principles in the Appendix to Recommendation (2014)7 (see paragraph 57 above), which do not establish an order of priority between the different channels of reporting and disclosure. In this connection, the Court refers to the wording of the Recommendation, to the effect that "the individual circumstances of each case will determine the most appropriate channel" (see paragraph 57 above) and points out that the criterion relating to the reporting channel must be assessed in the light of the circumstances of each case.

*(ii) The authenticity of the disclosed information*

124. The authenticity of the disclosed information is an essential feature in assessing the necessity of an interference with a whistle-blower's freedom of expression. The exercise of freedom of expression carries with it "duties and responsibilities" and "any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable" (see *Guja*, cited above, § 75).

125. However, a whistle-blower cannot be required, at the time of reporting, to establish the authenticity of the disclosed information. In this connection, the Court refers to the principle laid down in the Explanatory Memorandum to Recommendation (2014)7 (see paragraph 57 above), to the effect that "[e]ven where an individual may have grounds to believe that there is a problem which could be serious, they are rarely in a position to know the full picture. It is inevitable, therefore, ... that the subsequent investigation of the report or disclosure may show the whistleblower to have been mistaken" (see the Explanatory Memorandum, Appendix, § 85). Equally, it recognises, as stated by the UN Special Rapporteur, that "[w]histle-blowers who, based on a reasonable belief, report information that turns out not to be correct should nonetheless be protected against retaliation" (see paragraph 54 above). In such circumstances, it appears desirable that the individual concerned should not lose the benefit of the protection granted to whistle-blowers, subject to compliance with the other requirements for claiming entitlement to such protection.

126. Where a whistle-blower has diligently taken steps to verify, as far as possible, the authenticity of the disclosed information, he or she cannot be refused the protection granted by Article 10 of the Convention on the sole ground that the information was subsequently shown to be inaccurate. Where

it assesses the authenticity of the information, often concurrently with that of the good-faith criterion (see paragraph 129 below), the Court refers to the principle set out in Resolution 1729 (2010) of the Parliamentary Assembly of the Council of Europe (see paragraph 55 above), namely that "[a]ny whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she does not pursue any unlawful or unethical objectives" (see *Bucur and Toma,* cited above, § 107, and *Gawlik*, cited above, § 76).

127. In this connection, the Court reiterates that it has already accepted that under certain circumstances the information disclosed by whistle-blowers may be covered by the right to freedom of expression, even where the information in question has subsequently been proved wrong or could not be proved to be correct (see *Gawlik*, cited above, §§ 75-76, with the references cited therein). For this to apply, however, the whistle-blower must have carefully verified that the information was accurate and reliable (see, by contrast, *Gawlik*, cited above, §§ 78 and 85). Whistle-blowers who wish to be granted the protection of Article 10 of the Convention are thus required to behave responsibly by seeking to verify, in so far as possible, that the information they seek to disclose is authentic before making it public.

*(iii) Good faith*

128. The Court reiterates that "[t]he motive behind the actions of the reporting employee is [a] ... determinant factor in deciding whether a particular disclosure should be protected or not" (see *Guja*, cited above, § 77). In assessing an applicant's good faith, the Court verifies, in each case brought before it, whether he or she was motivated by a desire for personal advantage, held any personal grievance against his or her employer, or whether there was any other ulterior motive for the relevant actions (see *Guja*, cited above, §§ 77 and 93, and *Bucur and Toma*, cited above, § 117). In reaching its conclusion, it may have regard to the content of the disclosure and find, in support of its acknowledgment of good faith on the part of the whistle-blower, that there was "no appearance of any gratuitous personal attack" (see *Matúz v. Hungary*, no. 73571/10, § 46, 21 October 2014). The addressees of the disclosure are also an element in assessing good faith. The Court has thus taken account of the fact that the individual concerned "did not have immediate recourse to the media or the dissemination of flyers in order to attain maximum public attention" (see *Heinisch*, cited above, § 86, and contrast *Balenović v. Croatia,* (dec.), no. 28369/07, 30 September 2010) or that he or she had first attempted to remedy the situation complained of within the company itself (see *Matúz*, cited above, § 47).

129. The criterion of good faith is not unrelated to that of the authenticity of the disclosed information. In this connection, the Court observes that in *Gawlik* (cited above, § 83), it stated that it "[did] not have reasons to doubt

that the applicant, in making the disclosure, acted in the belief that the information was true and that it was in the public interest to disclose it".

130. In contrast, it has held that an applicant whose allegations were based on a mere rumour and who had no evidence to support them could not be considered to have acted in "good faith" (see *Soares v. Portugal*, no. 79972/12, § 46, 21 June 2016).

*(iv) The public interest in the disclosed information*

131. The Court observes at the outset that, generally speaking, there is little scope under Article 10 § 2 of the Convention for restrictions on debate of questions of public interest (see, *inter alia*, *Sürek v. Turkey (no. 1)* ([GC], no. 26682/95, § 61, ECHR 1999-IV, and *Stoll v. Switzerland* [GC], no. 69698/01, § 106, ECHR 2007-V).

132. In accordance with the Court's case-law, in the general context of cases involving the right to freedom of expression and information, the public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 97-103, ECHR 2015 (extracts)). In certain cases, the interest which the public may have in particular information can be so strong as to override even a legally imposed duty of confidentiality (see *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I). Thus, the fact of permitting public access to official documents, including taxation data, has been found to be designed to secure the availability of information for the purpose of enabling a debate on matters of public interest (see *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 172, 27 June 2017). However, the public interest cannot be reduced to the public's thirst for information about the private life of others, or to the reader's wish for sensationalism or even voyeurism (see *Couderc and Hachette Filipacchi Associés*, cited above, § 101).

133. In the specific context of cases concerning the protection of whistle-blowers, in which the disclosure by an employee, in breach of the applicable rules, of confidential information obtained in the workplace is in issue, the Court focuses on establishing whether the disclosed information is in the "public interest" (see *Guja*, cited above, § 74). In this connection, the Court reiterates that the concept of public interest is to be assessed in the light of both the content of the disclosed information and the principle of its disclosure. As its case-law currently stands, the range of information of public

interest that may fall within the scope of whistle-blowing is defined in a broad manner.

134. Firstly, the Court has accepted that issues falling within the scope of political debate in a democratic society, such as the separation of powers, improper conduct by a high-ranking politician and the government's attitude towards police brutality, were matters of public interest (see *Guja*, cited above, § 88). Equally, it has acknowledged the public interest in information concerning the interception of telephone communications in a society which had been accustomed to a policy of close surveillance by the secret services, implicating high-ranking officials and affecting the democratic foundations of the State (see *Bucur and Toma*, cited above, § 101), and in suspicions concerning the commission of serious offences, namely the euthanasia of several patients, raising doubts as to the medical treatment administered in a public hospital and whether it corresponded to the most up-to-date practice (see *Gawlik*, cited above, § 73). In these cases, the information in question concerned acts involving "abuse of office", "improper conduct" and "illegal conduct or wrongdoing".

135. Secondly, the Court has acknowledged the public interest involved in information concerning "shortcomings" in the provision of institutional care for the elderly by a State-owned company (see *Heinisch*, cited above, § 71, where the information related to a situation of staff shortages), or information reporting on "questionable" and "debatable" conduct or practices on the part of the armed forces (see *Görmüş and Others v. Turkey*, no. 49085/07, §§ 63 and 76, 19 January 2016, where the information related to a system for classifying media representatives depending on whether or not they were favourable to the armed forces).

136. The Court emphasises that in cases concerning situations in which employees claim the special protection to which whistle-blowers may be entitled after disclosing information to which they gained access in the workplace, notwithstanding the fact that they were under an obligation to observe secrecy or a duty of confidentiality, the public interest capable of serving as a justification for that disclosure cannot be assessed independently of the duty of confidentiality or of secrecy which has been breached. It also reiterates that, under Article 10 § 2 of the Convention, prevention of the disclosure of information received in confidence is one of the grounds expressly provided for permitting a restriction on the exercise of freedom of expression. In this connection, it is appropriate to note that many secrets are protected by law for the specific purpose of safeguarding the interests explicitly listed in that Article. This is the case with regard to national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, maintaining the authority and impartiality of the judiciary or the protection of the reputation or rights of others. The existence and content of such obligations usually reflect the scope and importance of the right or interest protected by the statutory duty of

secrecy. It follows that the assessment of the public interest in the disclosure of information covered by a duty of secrecy must necessarily have regard to the interests that this duty is intended to protect. This is particularly so where the disclosure involves information concerning not only the employer's activities but also those of third parties.

137. As is thus clear from the Court's case-law, the range of information of public interest which may justify whistle-blowing that is covered by Article 10 includes the reporting by an employee of unlawful acts, practices or conduct in the workplace, or of acts, practices or conduct which, although legal, are reprehensible (see the case-law references cited in paragraphs 133-135 above).

138. In the Court's view, this could also apply, as appropriate, to certain information that concerns the functioning of public authorities in a democratic society and sparks a public debate, giving rise to controversy likely to create a legitimate interest on the public's part in having knowledge of the information in order to reach an informed opinion as to whether or not it reveals harm to the public interest.

139. In this connection, the Court reiterates that, in a democratic system, the actions or omissions of the government must be subject to close scrutiny not only by the legislative and judicial authorities but also by public opinion (see *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 60, 8 July 1999).

140. Indeed, the Court deems it useful to note that the weight of the public interest in the disclosed information will vary depending on the situations encountered. In this connection, the Court considers that, in the context of whistle-blowing, the public interest in disclosure of confidential information will decrease depending on whether the information disclosed relates to unlawful acts or practices, to reprehensible acts, practices or conduct or to a matter that sparks a debate giving rise to controversy as to whether or not there is harm to the public interest (see paragraphs 137-138 above).

141. In the Court's view, information concerning unlawful acts or practices is undeniably of particularly strong public interest (see, for example, *Gawlik*, cited above, § 73, regarding the considerable public interest in information whose disclosure had been intended to prevent the repetition of potential offences). Information concerning acts, practices or conduct which, while not unlawful in themselves, are nonetheless reprehensible or controversial may also be particularly important (see, for example, *Heinisch*, cited above, § 71, regarding the vital importance of information concerning shortcomings in the care provided to vulnerable persons, disclosure of which had been intended to prevent abuse in the health sector).

142. That being so, although information capable of being considered of public interest concerns, in principle, public authorities or public bodies, it cannot be ruled out that it may also, in certain cases, concern the conduct of private parties, such as companies, who also inevitably and knowingly lay

themselves open to close scrutiny of their acts (see *Steel and Morris*, cited above, § 94), particularly with regard to commercial practices, the accountability of the directors of companies (see *Petro Carbo Chem S.E. v. Romania*, no. 21768/12, § 43, 30 June 2020), non-compliance with tax obligations (see *Público-Comunicação Social, S.A. and Others v. Portugal*, no. 39324/07, § 47, 7 December 2010), or the wider economic good (see *Steel and Morris*, cited above, § 94, and *Heinisch*, cited above, § 89).

143. Moreover, the Court would emphasise that the public interest in information cannot be assessed only on a national scale. Some types of information may be of public interest at a supranational – European or international – level, or for other States and their citizens.

144. In conclusion, while there is no doubt that the public may be interested by a wide range of subjects, this fact alone cannot suffice to justify confidential information about these subjects being made public. The question of whether or not a disclosure made in breach of a duty of confidentiality serves a public interest, such as to attract the special protection to which whistle-blowers may be entitled under Article 10 of the Convention, calls for an assessment which takes account of the circumstances of each case and the context to which it pertains, rather than *in abstracto* (see, in a different field, namely the right of access to information, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 162, 8 November 2016).

*(v) The detriment caused*

145. Under the Court's existing case-law, the detriment to the employer represents the interest which must be weighed up against the public interest in the disclosed information. Thus, in *Guja* (cited above, § 76), the Court stated that it had to evaluate "the damage, if any, suffered by the public authority as a result of the disclosure in question and assess whether such damage outweighed the interest of the public in having the information revealed". In this connection, the Court has already accepted that disclosure could cause detriment to the Attorney-General's Department by undermining public confidence in that institution's independence (ibid., § 90), or that intelligence services could sustain damage on account of a loss in public confidence that the State intelligence services complied with the principle of legality (see *Bucur and Toma*, cited above, § 115).

146. The Court has also acknowledged that disclosures could be prejudicial to the professional reputation and business interests of a State-owned company (see *Heinisch*, cited above, § 88), to the business interests and reputation of a hospital, as well as to public confidence in the provision of medical treatment (see *Gawlik*, cited above, § 79) and to the personal and professional reputation of a member of that hospital's staff (ibid.).

147. The Court reiterates that the criterion of detriment to the employer was initially developed with regard to public authorities or State-owned

companies: the damage in question, like the interest in the disclosure of information, was then public in nature. However, it points out that the disclosure of information obtained in the context of an employment relationship can also affect private interests, for example by challenging a private company or employer on account of its activities and causing it, and third parties in certain cases, financial and/or reputational damage. Nonetheless, the Court considers it useful to add that it does not exclude the possibility that such disclosures could also give rise to other detrimental consequences, by affecting, at one and the same time, public interests, such as, in particular, the wider economic good (see *Steel and Morris*, cited above, § 94), the protection of property, the preservation of a protected secret such as confidentiality in tax matters or professional secrecy (see *Fressoz and Roire*, cited above, § 53, and, *mutatis mutandis*, *Stoll*, cited above, § 115), or citizens' confidence in the fairness and justice of States' fiscal policies.

148. In those circumstances, the Court considers it necessary to fine-tune the terms of the balancing exercise to be conducted between the competing interests at stake: over and above the sole detriment to the employer, it is the detrimental effects, taken as a whole, that the disclosure in issue is likely to entail which should be taken into account in assessing the proportionality of the interference with the right to freedom of expression of whistle-blowers who are protected by Article 10 of the Convention.

*(vi) The severity of the sanction*

149. The Court notes at the outset that sanctions against whistle-blowers may take different forms, whether professional, disciplinary or criminal. In this regard, it has already had occasion to recognise that an applicant's removal or dismissal without notice constituted the heaviest sanction possible under labour law (see *Gawlik*, cited above, § 84, and the case-law references therein). It has also emphasised that a sanction of this type not only had negative repercussions on the applicant's career but could also have a chilling effect on other employees and discourage them from reporting any improper conduct, a chilling effect which was amplified in view of the widespread media coverage which certain cases could attract (see *Guja*, cited above, § 95, and *Heinisch*, cited above, § 91). It has also pointed out that this chilling effect works to the detriment of society as a whole (see *Heinisch*, cited above, § 91).

150. This observation also holds true with regard to the imposition of criminal penalties. The Court has frequently emphasised, in the general context of cases concerning Article 10 of the Convention, that the imposition of a criminal penalty is one of the most serious forms of interference with the right to freedom of expression (see, *inter alia*, *Rouillan v. France*, no. 28000/19, § 74, 23 June 2022; *Z.B. v. France*, no. 46883/15, § 67, 2 September 2021; and *Reichman v. France*, no. 50147/11, § 73, 12 July

2016) and that the domestic authorities must show restraint in resorting to criminal proceedings.

151. The fact of a person's conviction may in some cases be more important than the minor nature of the penalty imposed (see, for example, *Stoll*, cited above, § 154, and *Bédat v. Switzerland* [GC], no. 56925/08, § 81, 29 March 2016). Admittedly, the Court does not rule out the possibility that the national authorities may have recourse to criminal proceedings, without the resulting interference, in itself, being regarded as contrary to Article 10 of the Convention (see, among other authorities, *Bédat*, cited above, § 81).

152. In the particular context of whistle-blowing, the Court has already had occasion to hold that the use of criminal proceedings to punish the disclosure of confidential information was incompatible with the exercise of freedom of expression, having regard to the repercussions on the individual making the disclosure – particularly in terms of his or her professional career – and the chilling effect on other persons (see, with regard to a criminal conviction and the imposition of a suspended prison sentence, *Bucur and Toma*, cited above, § 119, and *Marchenko v. Ukraine*, no 4063/04, § 53, 19 February 2009). Nevertheless, it must be borne in mind that in many instances, depending on the content of the disclosure and the nature of the duty of confidentiality or secrecy breached by it, the conduct of the person claiming the protection potentially afforded to whistle-blowers may legitimately amount to a criminal offence.

153. Furthermore, neither the letter of Article 10 of the Convention nor the Court's case-law rule out the possibility that one and the same act may, where appropriate, give rise to a combination of sanctions or lead to multiple repercussions, whether professional, disciplinary, civil or criminal. Thus, the Court has already accepted that, in certain circumstances, the cumulative effect of a criminal conviction or the aggregate amount of financial penalties could not be considered as having had a chilling effect on the exercise of freedom of expression (see *Wojczuk*, cited above, § 105).

154. Nonetheless, it is clear from the Court's case-law that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the right to freedom of expression (see, among many other authorities, *Stoll*, cited above, § 153, and *Bédat*, cited above, § 79). The same applies to the cumulative effect of the various sanctions imposed on an applicant (see *Lewandowska-Malec v. Poland*, no. 39660/07, § 70, 18 September 2012).

### *2. Application of these principles in the present case*

#### (a) Preliminary considerations

155. The present case concerns the disclosure by the applicant, while he was employed by a private company, of confidential documents protected by professional secrecy, comprising fourteen tax returns from multinational

companies and two covering letters, obtained from his workplace (see paragraphs 14 and 23 above). In particular, it is characterised by the following features: on the one hand, the fact that the applicant's employer was a private entity, and, on the other, the fact that a statutory obligation to observe professional secrecy existed over and above the duty of loyalty which usually governs employee-employer working relationships; and, lastly, the fact that a third party had already made revelations concerning the activities of the same employer prior to the impugned disclosures. Despite its specific context, the case raises similar issues to those already examined by the Court (see, in particular, paragraphs 113-117 and 121-151 above). In those circumstances, the Grand Chamber considers that it is appropriate to apply in the present case the general criteria and principles as reaffirmed and clarified above (see paragraphs 111-154 above).

156. Although the applicant has invited the Court to define the concept of "whistle-blower" (see paragraphs 75 and 76 above), the Court reiterates that this concept has not, to date, been given an unequivocal legal definition (see the section on international and European law, paragraphs 54-58 above) and that it has always refrained from providing an abstract and general definition. In the present case, the Court intends to maintain that approach. Additionally, as noted in paragraph 144 above, the question of whether an individual who claims to be a whistle-blower benefits from the protection offered by Article 10 of the Convention calls for an assessment which takes account of the circumstances of each case and the context to which it prevails.

157. Firstly, the Court has therefore only to ascertain whether, and to what extent, the applicant's conviction in the circumstances of the present case amounted to disproportionate interference in the exercise of his right to freedom of expression as guaranteed by Article 10 of the Convention.

158. Secondly, as regards the specific question of the protection of whistle-blowers, the Court intends to conduct its review in line with the process usually adopted by it in discharging its functions. It will therefore confine itself in the present case to its usual approach, based on a case-by-case method, consisting in assessing the specific circumstances of each case submitted to it in the light of the general principles laid down in its case-law. In the present case, the Court will apply the review criteria defined by it under Article 10 of the Convention, and the *Guja* criteria as they have just been refined (see paragraphs 113-154 above). Some additional clarifications will be required in order to take into account the specific features of the present case. In this regard, the Court must therefore, as required by the principle of subsidiarity, assess, firstly, the manner in which the domestic courts implemented the protection afforded to whistle-blowers under Article 10 of the Convention, then, secondly, rule on its compatibility with the principles and criteria defined in the Court's case-law and, if necessary, apply them itself in the present case.

**(b) The Court of Appeal's assessment of the facts**

*(i) The subsidiary review carried out by the Court*

159. The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law in a manner that gives full effect to the Convention. Its role is ultimately to determine whether the way in which that law is interpreted and applied produces consequences that are consistent with the principles of the Convention (see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 250, 1 December 2020, and the case-law references therein).

160. The Court also points out that it has gradually developed in its case-law supervisory mechanisms which are intended to comply fully with the principle of subsidiarity. In this respect, its task is to verify whether the national courts applied the principles of the Convention as interpreted in the light of its case-law in a satisfactory manner, in such a way that their decisions are consistent with it (see, among other authorities, the judgment in *Hatton and Others v. the United Kingdom* [GC] no. 36022/97, ECHR 2003-VIII, for an example of such review).

161. In this connection, the Court emphasises that it has an increased expectation that the national courts will take account of its case-law in reaching their decisions where, on the questions at issue, that case-law is both substantial and stable and where it has identified a series of objective principles and criteria that can be easily applied. Thus, the Court has found a violation of the Convention where it held, with regard to one or other of the Convention's provisions, that the domestic courts had not given sufficiently detailed reasons for their decisions or assessed the case before them in the light of the principles defined in its case-law (see, among other authorities, *Makdoudi v. Belgium*, no. 12848/15, §§ 94-98, 18 February 2020, and *Lashmankin and Others v. Russia*, nos. 57818/09 and 14 others, § 454, 7 February 2017, for examples of a lack of "relevant and sufficient grounds" under Articles 8 and 11 of the Convention). Where, on the other hand, the domestic courts have carefully examined the facts, applied the relevant human-rights standards consistently with the Convention and its case-law, and adequately balanced the individual interests against the public interest in a case, the Court would require strong reasons to substitute its view for that of the domestic courts (see, with regard to Article 8 of the Convention, *M.A. v. Denmark* [GC], no. 6697/18, § 149, 9 July 2021).

162. With more specific regard to Article 10 of the Convention, the Court emphasises that insufficient reasoning or shortcomings in the domestic courts' reasoning have also led it to find a violation of this provision, where these omissions prevented it from effectively exercising its scrutiny as to whether the domestic authorities had correctly applied the standards established in its case-law (see, for example, *Ergündoğan v. Turkey*, no. 48979/10, § 33, 17 April 2018, and *Ibragim Ibragimov and Others*

*v. Russia*, nos. 1413/08 and 28621/11, §§ 106-111, 28 August 2018). Indeed, the Court expects the domestic courts to weigh up the rights or interests concerned in accordance with the procedures defined by it and in conformity with the criteria it has laid down (see *Von Hannover (no. 2),* cited above, § 107, and *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150-155, 18 January 2011).

*(ii) The Court of Appeal's acknowledgment of the direct effect of the Convention*

163. In the present case, the Court notes firstly, from its reading of the Attorney-General's submissions to the Court of Appeal (see paragraphs 22-23 above) and of the Court of Appeal's judgment (see paragraphs 24 and 31-37 above), that the national authorities, fully aware of the importance which the Court attaches to the protection of whistle-blowers, endeavoured to comply with the principles identified in its case-law under Article 10 of the Convention. In this connection, it considers that there is nothing to support the applicant's allegations that the domestic authorities merely referred formally to the "*Guja* criteria", without genuinely applying them, or at least applied them only partially (see paragraphs 70 and 78 above).

164. It is clear from the Court of Appeal's judgment that, after reiterating the direct effect of the Convention in domestic law and holding that the legislation recognising whistle-blower status in Luxembourg law could not apply to the present case (see paragraph 25 above), it ruled in the light of Article 10 of the Convention and the Court's relevant case-law. In so doing, it reiterated that freedom of expression, "[an] essential freedom, enshrined in a supranational instrument, cannot be invalidated by domestic rules" and acknowledged that, in the context of a debate on a matter of public interest, "the whistle-blower's freedom of expression [could], where appropriate and subject to certain conditions, prevail and be relied on as a circumstance justifying a breach of national law" (see paragraph 25 above).

165. The Court further notes that the Court of Appeal also took account of its case-law to the effect that the unlawfulness of the divulged conduct was not a "criterion in deciding whether to grant the protective status of whistle-blower", noting that a disclosure could relate to a "serious shortcoming" (see paragraph 31 above) and concern a public interest without "the act, omission, practice, conduct or shortcoming necessarily constituting a criminal offence" (see paragraph 32 above).

166. The Court infers from all of these elements that its case-law on the protection of the freedom of expression of whistle-blowers provided guidance to the Court of Appeal in interpreting the content and scope of the applicant's right to freedom of expression. In this connection, the Court cannot but commend the Court of Appeal's diligence in applying, one by one, the *Guja* criteria to the factual circumstances submitted to it for review (see paragraphs 31-37 above), in order to determine whether or not the applicant's criminal conviction could amount to a disproportionate interference with his

right to respect for freedom of expression. In the present case, there is no doubt that the national authorities, and in particular the Court of Appeal, endeavoured to apply its case-law faithfully (a fact which, moreover, formed the basis for A.D.'s acquittal of the charge of handing over documents concerning PwC's activities and the practices of the Luxembourg tax authorities to the journalist E.P. (see paragraph 38 above)), and to set out in detail the various steps of the reasoning they had followed.

*(iii) The Court of Appeal's implementation of the Guja criteria*

167. The Court notes that the parties are in agreement that the applicant fulfilled some of the conditions laid down in its case-law in order to be eligible for the enhanced protection afforded to whistle-blowers under Article 10 of the Convention. This was so with regard to the channel selected for making the disclosure, the public interest in the disclosure, the authenticity of the documents disclosed and the applicant's good faith. These aspects have not been specifically raised before the Grand Chamber, whether with regard to the factual circumstances or their assessment by the domestic courts.

168. In their observations, the Government argued that the balancing of the public interest in the disclosed information against the resultant damage sustained by the employer was the issue under discussion before the Grand Chamber (see paragraph 85 above). According to the Court's settled case-law, the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, there being no basis for a merely partial referral of the case (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 66, ECHR 2004-XI). The Court would add, for the sake of clarification, that the "case" referred to the Grand Chamber is the application as it has been declared admissible (see *K. and T. v. Finland* [GC], no. 25702/94, § 141, ECHR 2001-VII, and *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 171-177, 21 November 2019).

169. It follows that there is no reason for the Grand Chamber to accede to the Government's invitation and limit the scope of its examination to a single aspect of the case. Moreover, the applicant invited the Grand Chamber to clarify the stages of the reasoning which leads to granting of the protection attached to whistle-blower status. In his submissions to the Grand Chamber, he argued that it was necessary to specify the manner in which the competing interests were to be balanced in implementing the *Guja* criteria.

170. In this regard, the applicant criticised the Court of Appeal for having applied these criteria in isolation (see paragraph 65 above). For its part, the Court considers it useful to point out that in cases involving the freedom of expression of whistle-blowers, it verifies compliance with the various "*Guja* criteria", taken separately, without establishing a hierarchy between them or indicating the order in which they are to be examined. It appears that this

order has varied from one case to another, without this fact having had an impact on the outcome of the case brought before it (compare, for example, the order in which the criteria are examined in the cases of *Bucur and Toma*, §§ 95-119; *Heinisch*, §§ 71-92; and *Gawlik*, §§ 73-84, all cited above). The Court stresses, however, that in view of their interdependence (see paragraphs 126 and 129 above), it is after undertaking a global analysis of all these criteria that it rules on the proportionality of an interference. This being so, the Court decides, in the present case, to review them successively in the light of the specific circumstances of the case and having regard to the Court of Appeal's assessment.

(α) Whether other channels existed to make the disclosure

171. The Court considers that the tax-optimisation practices for the benefit of large multinational companies and the tax returns – legal acts providing information (see paragraph 28 above) – prepared by the applicant's employer for the Luxembourg tax authorities on behalf of its clients, were legal in Luxembourg. There was therefore nothing wrongful about them, within the meaning of the law, which would have justified an attempt by the applicant to alert his hierarchy in order to put an end to activities constituting his employer's normal activity.

172. The Court considers that, in such a situation, only direct recourse to an external reporting channel is likely to be an effective means of alert. As the MLA has argued, in certain circumstances, the use of the media may be a condition for effective whistle-blowing (see paragraph 97 above). In those circumstances, where conduct or practices relating to an employer's normal activities are involved and these are not, in themselves, illegal, effective respect for the right to impart information of public interest implies that direct use of an external reporting channel, including, where necessary, the media, should be considered acceptable. This is also what the Court of Appeal accepted in the present case, in finding that the applicant could not have "acted otherwise, and that informing the public through the media had, on this occasion, been the only realistic alternative in order to raise the alert" (see paragraph 34 above). The Court would emphasise that such a finding is consistent with its case-law.

(β) The authenticity of the disclosed information

173. The applicant handed over to the journalist E.P. fourteen tax returns and two covering letters, "the accuracy and authenticity" of which had been confirmed by the Court of Appeal and are not called into question in any way (see paragraph 33 above). As the criterion of the authenticity of the disclosed information has thus also been met, there are no grounds for the Court to depart from the Court of Appeal's findings on this point.

(γ) The applicant's good faith

174. It appears from the Court of Appeal's judgment that the applicant did not act "for profit or in order to harm his employer" (see paragraph 28 above) and it accepted that the criterion of good faith had been met (see paragraph 37 above). The Court does not discern any reason to depart from that assessment and notes in its turn that the applicant met the good-faith requirement at the time of making the disclosures in question.

(δ) The balancing of the public interest in the disclosed information and the detrimental effects of the disclosure

175. As a preliminary point, the Court considers it useful to clarify that, having regard to the general principles identified in its case-law (see paragraphs 111-119 above), the dispute in the present case cannot be considered in terms of a conflict of rights, as alleged by the Government (see paragraph 83 above). Its assessment of the circumstances of the case will therefore be conducted solely under Article 10 of the Convention, the first paragraph of which guarantees the right to freedom of expression, which includes the right to impart information, and the second paragraph of which lists the grounds on which States may restrict that right, including the protection of the reputation or rights of others and the need to prevent the disclosure of information received in confidence.

176. It follows that the Grand Chamber concurs with the Chamber's finding (§ 95 of the Chamber judgment), which the applicant invites it to confirm, to the effect that the "present case requires an examination of the fair balance that has to be struck between these competing interests".

177. The Court further notes that its role is in principle limited to ascertaining whether the domestic courts struck a fair balance between, on the one hand, the public interest of the disclosed documents and, on the other, the entirety of the harmful effects arising from their disclosure, in deciding whether or not the applicant could benefit from the enhanced protection to which whistle-blowers are entitled under Article 10 of the Convention. In that connection, it reiterates that the competent national authorities must provide sufficiently detailed reasons for their decisions, to enable the Court to perform the supervisory function entrusted to it. Where the reasoning is insufficient, without any real balancing of the interests in issue, this would be contrary to the requirements of Article 10 of the Convention (see *Makdoudi*, cited above, §§ 94-98, and *Lashmankin and Others*, cited above, § 454).

178. The Court reiterates however, that, while confirming and consolidating the principles identified in its case-law on the protection of whistle-blowers, it has, in the present case, refined the terms of the balancing exercise to be carried out between the competing interests at stake (see paragraphs 120 and 131-148 above). If, in the context of its review, the Court finds that the balancing exercise undertaken by the domestic courts does not satisfy the requirements thus defined, it will then be for the Court itself to

undertake a balancing exercise between the different interests involved in this case.

179. With this in view, the Court will examine in turn the context in which the impugned disclosure occurred, the public interest served by it and the harmful effects to which it gave rise.

– *The context of the impugned disclosure*

180. The Court specifies that the background to a disclosure may play a crucial role in assessing the weight of the public interest attached to the disclosure of information when set against the damaging effects entailed by it, and that it ought to be possible to assess this weight in the light of the factual circumstances surrounding the disclosure.

181. In the present case, the Court notes that the applicant handed over the sixteen documents in question to the journalist E.P. a few months after the first *Cash Investigation* programme, challenging the practice of ATAs and the Luxembourg tax authorities, had been broadcast; moreover, a year elapsed between the two television programmes, which relied in turn on the documents disclosed by A.D., who has been granted whistle-blower status, and the applicant (see paragraph 14 above).

182. When assessing the context in which the hand-over had taken place, the Court of Appeal considered that the tax returns in question had admittedly been useful to E.P. in so far as they confirmed the results of the journalists' investigation, but that, nevertheless, they did not provide "any previously unknown cardinal information capable of relaunching or contributing to the debate on tax evasion". It concluded that those tax returns had "neither contributed to the public debate on the Luxembourg practice of ATAs, nor triggered a debate on tax evasion [nor] provided essential, new and previously unknown information", and found that the applicant had caused damage to his employer which "outweighed the general interest" entailed by the disclosure of the impugned information (see paragraph 35 above).

183. The applicant has challenged, in particular, the requirement that the disclosed information must be "essential, new and previously unknown" (see paragraph 68 above). The Court also takes note of the observations by the third-party interveners, who argued that such a requirement, which was relative and unforeseeable in nature, would be a source of legal uncertainty for whistle-blowers (see paragraphs 98 and 104 above).

184. In this connection, the Court reaffirms that a public debate may be of an ongoing nature and draw on additional information (see *Dammann*, cited above, § 54, and *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal*, nos. 11182/03 and 11319/03, § 27, 26 April 2007). Revelations concerning current events or pre-existing debates may also serve the general interest (see *Couderc and Hachette Filipacchi Associé*, cited above, § 114). Indeed, public debates are not frozen in time and, as submitted by the MLA, "citizens' attitudes to issues of general interest evolve

over time" (see paragraph 98 above). Accordingly, in the Court's view, the sole fact that a public debate on tax practices in Luxembourg was already underway when the applicant disclosed the impugned information cannot in itself rule out the possibility that this information might also be of public interest, in view of this debate, which had given rise to controversy as to corporate tax practices in Europe and particularly in France (see paragraphs 186 to 191 below), and the public's legitimate interest in being apprised of them.

– *The public interest of the disclosed information*

185. The Court refers at the outset to the general principles concerning the criterion of public interest (see paragraphs 133-144 above). It also reiterates that, generally speaking, the question of taxation is undoubtedly a matter of general interest for the community (see *Taffin and Contribuables Associés v. France*, no. 42396/04, § 50, 18 February 2010). In this connection, the Court notes that it has already acknowledged, in another context, that the availability of information about taxation data, and similarly the publication of notices of tax assessment, could contribute to a public debate on a matter of general interest (see, respectively, *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 172, and *Fressoz and Roire*, cited above, § 50). In the present case, the Court of Appeal accepted that the revelations made by the applicant and A.D. were of public interest and that they had "opened the door to public debate in Europe and in Luxembourg on corporate taxation, in particular the taxation of multinational companies, tax transparency, the practice of ATAs and tax fairness in general" (see paragraph 32 above). On the question of whether the information disclosed by the applicant concerned an area of public interest, the Court sees no reason to depart from the Court of Appeal's findings, which are consistent with its case-law, as to the criterion of public interest, to the effect that the practices highlighted by the applicant could be regarded as alarming or scandalous.

186. The Court takes note of the arguments put forward by the applicant, who accuses the Court of Appeal of having restricted in the present case the scope of the public interest in the impugned disclosure and, consequently, its weight in relation to that of the damage caused (see paragraph 68 above). It also notes the arguments of the Government, which, for their part, disputed that there had been any restrictive interpretation of the concept of public interest by the Court of Appeal (see paragraph 88 above). Without denying that the information disclosed by the applicant contributed to the debate on the tax practices of certain companies, they argued, however, that account should be taken, as the Court of Appeal had done, of the "limited relevance" to that debate of the disclosed documents.

187. In this respect, the Court emphasises that the purpose of whistle-blowing is not only to uncover and draw attention to information of public interest, but also to bring about change in the situation to which that

information relates, where appropriate, by securing remedial action by the competent public authorities or the private persons concerned, such as companies. However, as the MLA submitted (see paragraph 97 above), it is sometimes necessary for the alarm to be raised several times on the same subject before complaints are effectively dealt with by the public authorities, or in order to mobilise society as a whole and enable it to exercise increased vigilance. Accordingly, in the Court's opinion, the fact that a debate on the practices of tax avoidance and tax optimisation practices in Luxembourg was already in progress when the impugned documents were disclosed cannot suffice to reduce the relevance of these documents.

188. In the present case, even supposing, as the Court of Appeal held, that the tax returns at issue were not such as to provide information on the practice of ATAs or of the Luxembourg tax authorities (see paragraph 35 above), the fact remains that those tax returns constituted relevant information. A tax return informs "the authorities about the tax decisions taken by the taxpayer" and sets out "requests for deductions and for the exercise of various taxation options provided for by law" (see paragraph 28 above). Thus, whilst it is true that the ATAs and tax returns are two types of document referring to different tax practices, the disclosure of those two types of document nevertheless contributed, in the present case, to building up a picture of the taxation practices in force in Luxembourg, their impact at European level and the tax strategies put in place by renowned multinational companies in order artificially to shift profits to low-tax countries and, in so doing, to erode the tax bases of other States (see paragraphs 32 and 35 above).

189. In those circumstances, the Court considers that the impugned information was not only apt to be regarded as "alarming or scandalous", as the Court of Appeal held, but also provided fresh insight, the importance of which should not be minimised in the context of a debate on "tax avoidance, tax exemption and tax evasion" (see paragraph 32 above), by making available information about the amount of profits declared by the multinational companies in question, the political choices made in Luxembourg with regard to corporate taxation, and their implications in terms of tax fairness and justice, at European level (see paragraphs 23 and 32 above) and, in particular, in France.

190. The Court further notes that the Court of Appeal took into account the fact that the applicant had not selected the tax returns for disclosure in order to supplement the ATAs already in the journalist's possession, but solely because the multinational companies concerned were well known (see paragraph 35 above). Unlike the Court of Appeal, however, the Court considers that the extent to which multinationals in question were well known was not devoid of relevance and importance in the context of the debate which began after the first *Cash Investigation* programme was broadcast. Although the complex legal and financial structures on which tax optimisation practices are based are difficult for non-specialists and, more generally, for the general

public to understand, the scope of tax returns which, as the Court of Appeal indicated, provide information on a company's financial situation and assets (see paragraph 28 above) is, on the other hand, much easier to grasp.

191. Since they also concerned multinational companies known to the general public, those tax returns were highly illustrative of the tax practices in force in Luxembourg and the tax choices of the companies benefiting from those practices. Any taxpayer subject to tax is able to understand a document such as a tax return. Thus, the documents disclosed by the applicant contributed to the transparency of the tax practices of multinational companies seeking to benefit from locations where the tax system is most advantageous and could, in that sense, help the public to form an informed opinion on a subject which is of great technical complexity, such as corporate taxation, but which relates to important economic and social issues.

192. The Court also considers that the weight of the public interest attached to the impugned disclosure cannot be assessed independently of the place now occupied by global multinational companies, in both economic and social terms. The role of tax revenues on States' economies and budgets and the considerable challenges posed for governments by tax strategies such as profit shifting, which may be used by some multinational companies, must also be taken into consideration. The Court concludes from this that the information relating to the tax practices of multinational companies, such as those whose tax returns were made public by the applicant, undoubtedly contributed to the ongoing debate – triggered by A.D.'s initial disclosures – on tax evasion, transparency, fairness and tax justice. There is no doubt that this is information in respect of which disclosure is of interest for public opinion, in Luxembourg itself, whose tax policy was directly at issue, in Europe and in other States whose tax revenues could be affected by the practices disclosed.

– *The detrimental effects*

193. In response to the applicant's submission inviting it to abandon the criterion of damage caused to the employer (see paragraph 73 above), the Court reaffirms that this criterion retains its relevance in the Court's examination of the proportionality or otherwise of a measure penalising disclosure, by a whistle-blower, of information of public interest. It is nonetheless appropriate to extend it, by taking into account, with regard to the other side of the scales, all of the detrimental effects arising from the impugned disclosure (see paragraph 148 above).

194. In this connection, it notes, firstly, that the Court of Appeal held that the applicant's employer (PwC) had been "associated with a practice of tax evasion, if not tax optimisation, ... described as unacceptable", "[had] been the victim of criminal offences" and "[had] necessarily suffered harm" (see paragraph 35 above). In the Court's opinion, the damage sustained by the applicant's employer cannot be assessed only in respect of the possible

financial impact of the impugned disclosure. Like the Chamber (see paragraph 100 of the Chamber judgment), the Grand Chamber accepts that PwC sustained some reputational damage, particularly among its clients, since the impugned disclosure could have raised questions about its ability to ensure the confidentiality of the financial data entrusted to it and the tax activities carried out on their behalf. The Court also notes, however, that no longer-term damage would appear to have been established (see paragraph 15 above).

195. Secondly, the Court considers it necessary to examine whether other interests were affected by the impugned disclosure (see paragraph 86 above). The fact that the disclosure concerns documents held by a private-sector employer does not necessarily rule out the possibility that other interests than those of that employer, including public interests, may have been affected by it, given that the Court's assessment must cover all of the detrimental effects arising from the impugned disclosure (see paragraphs 147-148 above).

196. In this regard, the Government argued, among other points, that the disclosure in question had adversely affected the interests of those who had entrusted the applicant's employer with the task of optimising their tax situation, and the public interest in maintaining professional secrecy (see paragraph 86 above). With regard to PwC's clients, the Court recognises, in view of the media and political repercussions which followed the disclosure of the tax returns in question, that their disclosure could have been prejudicial, at least to some extent, to the private interests and reputations of the multinational companies whose names were revealed to the general public.

197. As to the public interest allegedly damaged by the revelation, the Court emphasises that in the present case it is not only the applicant's disclosure of information that is in issue, but also the fraudulent removal of the data carrier (see paragraph 27 above) and that, in this connection, the public interest in preventing and punishing theft must also be taken into consideration. Additionally, the Court points out that the applicant was not only bound by the duty of loyalty and discretion owed by any employee to his or her employer but also by the rule of professional secrecy which prevails in the specific field of the activities carried out by PwC, and to which he was legally bound in the exercise of his professional activities (see paragraph 29 above). The preservation of professional secrecy is undeniably in the public interest, in so far as its aim is to ensure the credibility of certain professions by fostering a relationship of trust between professionals and their clients. It is also a principle of public policy, breach of which may be punishable under criminal law.

198. In the present case, without it being necessary to assess the scope of the professional secrecy to which the applicant was subject – an assessment which is primarily a matter for the national courts – the Court notes that the Court of Appeal held that the secrecy of legally regulated professions was a matter of public policy and was intended to protect all individuals who might

come into contact with a professional. It had also noted that secrecy was, generally speaking, necessary for the exercise of the activity carried out by the applicant's employer (see paragraph 29 above).

199. However, the Court of Appeal simply placed the damage suffered by PwC alone on the other side of the scales, and took into account only the fact that the claimant's employer had been "associated with a practice of tax evasion, if not tax optimisation", that it had been "the victim of criminal offences" and had "necessarily suffered damage" (see paragraph 35 above).

200. Admittedly, in the Court's view, the assessment criteria used by the Court of Appeal with regard to the damage suffered by PwC, namely "damage to ... image" and "loss of confidence" (see paragraph 35 above), are undoubtedly relevant. However, the Court of Appeal confined itself to formulating them in general terms, without providing any explanation as to why it ultimately held that such damage, the nature and scope of which had not, moreover, been determined in detail, "outweighed the general interest" in disclosure of the impugned information. The Court concludes that the Court of Appeal did not place on the other side of the scales all of the detrimental effects that ought to have been taken into account.

– *The outcome of the balancing exercise*

201. In the light of the above considerations, the Court finds that the balancing exercise undertaken by the domestic courts did not satisfy the requirements it has identified in the present case (see paragraphs 131-148 above). On the one hand, the Court of Appeal gave an overly restrictive interpretation of the public interest of the disclosed information (see paragraphs 32 and 35 above). At the same time, it failed to include the entirety of the detrimental effects arising from the disclosure in question on the other side of the scales, but focused solely on the harm sustained by PwC. In finding that this damage alone, the extent of which it did not assess in terms of that company's business or reputation, outweighed the public interest in the information disclosed, without having regard to the harm also caused to the private interests of PwC's customers and to the public interest in preventing and punishing theft and in respect for professional secrecy, the Court of Appeal thus failed to take sufficient account, as it was required to do, of the specific features of the present case.

202. In these circumstances, it is for the Court itself to undertake the balancing exercise of the interests involved. In this connection, it reiterates that it has acknowledged that the information disclosed by the applicant was undeniably of public interest (see paragraphs 191-192 above). At the same time, it cannot overlook the fact that the impugned disclosure was carried out through the theft of data and a breach of the professional secrecy by which the applicant was bound. That being so, it notes the relative weight of the disclosed information, having regard to its nature and the extent of the risk attached to its disclosure. In the light of its findings (see paragraphs 191-192

above) as to the importance, at both national and European level, of the public debate on the tax practices of multinational companies, to which the information disclosed by the applicant has made an essential contribution, the Court considers that the public interest in the disclosure of that information outweighs all of the detrimental effects.

203. Lastly, in order to complete its examination of whether or not the impugned interference was proportionate, the Court must now assess the severity of the penalty imposed on the applicant.

(ε) The severity of the sanction

204. The Court reiterates that in the context of assessing proportionality, irrespective of whether or not the penalty imposed was a minor one, what matters is the very fact of judgment being given against the person concerned (see *Couderc and Hachette Filipacchi Associés*, cited above, § 151). Having regard to the essential role of whistle-blowers, any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing any future revelation, by whistle-blowers, of information whose disclosure is in the public interest, by dissuading them from reporting unlawful or questionable conduct (ibid., and, *mutatis mutandis*, *Görmüş*, cited above, § 74). The public's right to receive information of public interest as guaranteed by Article 10 of the Convention may then be imperilled.

205. In the present case, after having been dismissed by his employer, admittedly after having been given notice, the applicant was also prosecuted and sentenced, at the end of criminal proceedings which attracted considerable media attention, to a fine of EUR 1,000. Having regard to the nature of the penalties imposed and the seriousness of the effects of accumulating them, in particular their chilling effect on the freedom of expression of the applicant or any other whistle-blower, an aspect which would not appear to have been taken into account in any way by the Court of Appeal, and especially bearing in mind the conclusion reached by it after weighing up the interests involved, the Court considers that the applicant's criminal conviction cannot be regarded as proportionate in the light of the legitimate aim pursued.

**(c) Conclusion**

206. The Court, after weighing up all the interests concerned and taken account of the nature, severity and chilling effect of the applicant's criminal conviction, concludes that the interference with his right to freedom of expression, in particular his freedom to impart information, was not "necessary in a democratic society".

207. There has accordingly been a violation of Article 10 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

208. 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

209. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

210. The Government did not comment on those claims before the Grand Chamber.

211. Ruling on an equitable basis, the Court finds it appropriate to award the applicant the entire amount claimed, namely EUR 15,000.

### B. Costs and expenses

212. The applicant also claimed EUR 51,159 in respect of the costs and expenses incurred before the domestic courts and submitted the related invoices. He also claimed EUR 26,150 in respect of the costs and expenses incurred before the Court, which he broke down as follows: EUR 3,500 in respect of the proceedings before the Chamber and EUR 22,650 in respect of the proceedings before the Grand Chamber. He submitted a fee agreement and the invoices in respect of the proceedings before the Court.

213. The Government did not comment on those claims before the Grand Chamber.

214. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 40,000 covering costs under all heads.

## FOR THESE REASONS, THE COURT,

1. *Holds*, by twelve votes to five, that there has been a violation of Article 10 of the Convention;

2. *Holds*, by twelve votes to five,
   (a) that the respondent State is to pay the applicant, within three months:
      (i) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to him, in respect of non-pecuniary damage;

(ii) EUR 40,000 (forty thousand euros), plus any tax that may be chargeable to him, 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses*, unanimously, the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 14 February 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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|---|---|
| Abel Campos | Robert Spano |
| Deputy Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Joint dissenting opinion of judges Ravarani, Mourou-Vikström, Chanturia and Sabato;

(b) Statement of dissent by Judge Kjølbro.

R.S.
A.C.

# JOINT DISSENTING OPINION OF JUDGES RAVARANI, MOUROU-VIKSTRÖM, CHANTURIA AND SABATO

*(Translation)*

To our regret, we have decided not to join the majority in finding a violation of Article 10 of the Convention on account of the domestic courts' refusal to grant the applicant whistle-blower status, thereby enabling him to avoid the penalties provided for by criminal law, particularly in respect of theft and professional secrecy.

That being so, we are far from disagreeing with everything set out in in the judgment. We agree on the need to "revisit" the *Guja* criteria and, to a very large extent, we subscribe to the manner in which these criteria have been developed.

Our reservations concern only one specific point, relating to the established principles and their application to the present case.

## I. The principles

***The principles identified in the* Guja *case-law*.** In paragraphs 110 to 154, the judgment retraces the case-law on whistle-blowers (while expressly refusing to define this concept; see paragraph 156 of the present judgment) and, in particular, reiterates the criteria identified in the Grand Chamber judgment in the case of *Guja v. Moldova* ([GC], no. 14277/04, ECHR 2008), namely whether or not alternative channels for the disclosure were available; the public interest in the disclosed information; the authenticity of the disclosed information; the detriment to the employer; the whistle-blower's good faith; and the severity of the sanction (see paragraph 114 of the present judgment).

Whistle-blower status confers very powerful protection on the recipient, since it releases him or her from the application of criminal law. It is therefore essential that the granting of such status be subject to the utmost caution and to criteria that are defined strictly. In addition, the assessment of the higher "cause" which motivates the whistle-blower must be free of any political or ideological considerations, at the risk of weakening whistle-blower status itself. In this connection, it is important to note that the Grand Chamber, in the case of *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* ([GC], no. 17224/11, 27 June 2017), was careful to exclude from the protection regime for whistle-blowers persons making defamatory statements complaining of allegedly racist conduct in the workplace.

***The broadening of the concept of "public interest".*** The judgment states that the Court attaches importance to the stability and foreseeability of its case-law in terms of legal certainty. While claiming "to confirm and consolidate the principles established in [its] case-law with regard to the

protection of whistle-blowers", the majority nonetheless consider it appropriate to "fine-tune" them (see paragraphs 148 and 158 of the judgment). They thus, *inter alia*, considerably extend the concept of the public interest which must be attached to the disclosed information if the whistle-blower is to enjoy protection. After identifying in the Court's case-law the two types of conduct on an employer's part which are characterised by the necessary public interest to justify granting immunity to a whistle-blower, namely, on the one hand, "unlawful acts, practices or conduct in the workplace" and, on the other, "acts, practices or conduct which, although legal, are reprehensible" (see paragraph 137 of the judgment), the judgment adds a third category, one that is entirely new in the area of whistle-blowing, that is, "certain information that concerns the functioning of public authorities in a democratic society and sparks a public debate, giving rise to controversy likely to create a legitimate interest on the public's part in having knowledge of the information in order to reach an informed opinion as to whether or not it reveals harm to the public interest" (see paragraph 138 of the judgment), while specifying that the information may also concern the conduct of private parties (see paragraph 142 of the judgment).

***An excessively vague criterion.*** With regard to the three categories of information that, according to the judgment, may legitimately be revealed by a whistle-blower – unlawful conduct, acts which are reprehensible without being illegal, or information sparking a debate – the Grand Chamber emphasises that the public interest in disclosure will diminish according to whether the information falls into the first, second or third category (see paragraph 140 of the judgment). However, it can hardly be disputed that the uncertainly surrounding these three categories grows in parallel. Whilst it is admittedly straightforward to identify illegality in a particular form of conduct, it is already much more difficult to determine what is reprehensible while remaining legal. The apogee of uncertainly is reached in seeking to identify information sparking public debate. In reality, anything can fall into this category, even the health of a person holding a leadership position or the bank assets of a politician. Such information is protected, for good reason, by professional secrecy or other forms of confidentiality. With the introduction of this new criterion, this protection is deprived of its substance. At the same time, legal certainty is set aside.

***A doubtful case-law precedent ...*** In support of the introduction of this third category, the judgment refers to the Court's case-law on freedom of expression; citing more specifically the case of *Fressoz and Roire v. France* ([GC], no. 29183/95, ECHR 1999-I), it emphasises that, in "certain cases, the interest which the public may have in particular information can be so strong as to override even a legally imposed duty of confidence" (see paragraph 132 of the present judgment). However, the judgment in question was delivered in respect of journalists who had published the tax assessments of the

managing director of a major company, thus revealing his salary, which was deemed to be exorbitant. The question before the Court on that occasion was not the handling of these unlawfully obtained documents nor the breach of professional secrecy (undoubtedly committed by other persons) – indeed, the public prosecutor had decided not to initiate proceedings in that respect – but rather the fact of the journalists having derived a benefit from the theft of those documents. It was thus the issue of the *protection of journalistic sources* which was raised. The Court grants that protection subject to certain conditions, including the existence of a public interest. However, what the above-cited judgment certainly does not do is to relieve an individual holding a professional secret of the obligation to respect it, on the grounds that the information that he or she intends to provide to the public is in the general interest. To return to the examples given above, a journalist may disclose a person's state of health or the amount of his or her bank balance, but the doctor or bank employee behind the leak, if identified, will face a criminal sanction.

***... which devalues professional secrecy ...*** The present *Halet* judgment thus ventures into unknown territory, deliberately taking the risk of undermining professional secrecy, which must now defer to information that is "merely" of interest but does not lift the lid on conduct that is illegal or, at the least, reprehensible. Admittedly, the judgment acknowledges that the public interest capable of serving as a justification for that disclosure "cannot be assessed independently of the duty of confidentiality or of secrecy which has been breached" (see paragraph 136 of the judgment). However, this apparent tribute to the importance of professional secrecy or other forms of confidentiality is left hanging and the conflict between disclosure and the duty of secrecy remains unresolved. This contradiction is especially apparent in paragraph 152 of the judgment which, on the one hand, reiterates that, in the particular context of whistle-blowing, "the use of criminal proceedings to punish the disclosure of confidential information [is] incompatible with the exercise of freedom of expression", but, on the other hand, acknowledges that, in many instances, the conduct of the person claiming the protection potentially afforded to whistle-blowers may "legitimately" amount to a criminal offence.

In any event, instead of setting out criteria that provide a minimum of clarity and which could serve as guidelines for potential whistle-blowers and for prosecution authorities called on to decide whether or not to institute proceedings or bring charges, the judgment creates confusion and leaves both sides facing difficult choices with uncertain outcomes. Moreover, this uncertainty affects not only the prosecution authorities, but also risks seriously undermining the relationship of trust which forms the basis of any private-law relationship and, in particular, of an employment contract.

***...and is unnecessary for resolving the dispute.*** This is all the more regrettable in that, in resolving the specific dispute before it, the majority

were not required to go so far into the principles, given that the actions denounced by the applicant fall into the second category, namely reprehensible acts, and that the recognition of that category is in itself an innovation.

***An uncited precedent.*** Another case in which freedom of expression and professional secrecy were brought together has not been cited in the present judgment. We refer to the case of *Éditions Plon v. France* (no. 58148/00, ECHR 2004-IV), where the Court was required to rule on an alleged violation of Article 10 of the Convention, submitted by a publisher who had been prohibited by the French courts, initially on a temporary basis and then permanently, from distributing a book written jointly by a journalist and President Mitterrand's personal doctor. The book described the efforts that had been made to conceal from the public the President's cancer, which was diagnosed shortly after his election in 1981. While not criticising the temporary ban on the book, which was imposed against a background of high emotions and serious damage to the deceased's reputation, the Court nonetheless considered that maintaining the prohibition on the book's distribution was not justified. It accepted that "the more time that elapsed, the more the public interest in discussion of the history of ... the two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality" (*Plon*, cited above, § 53). However, and this is the relevant point in the context of the *Halet* case, the judgment stressed that "this certainly does not mean that the Court considers that the requirements of historical debate may release medical practitioners from the duty of medical confidentiality, which under French law is general and absolute, save in strictly exceptional cases provided for by law" (ibid, § 53).

The *Plon* judgment thus carefully distinguished between the duty of professional secrecy imposed on certain individuals holding sensitive information, and the freedom to impart, under certain conditions, such information, enjoyed by persons who are not bound by such secrecy, including primarily journalists, and, in that particular case, a publishing company.

## II. Application of those principles to the present case

***The approach taken in the judgment to the Court's scrutiny.*** The judgment, faithful to the Court's subsidiary role, recognises that the national courts had "endeavoured to apply its case-law faithfully (a fact which, moreover, formed the basis for A.D.'s acquittal of the charge of handing over documents concerning PwC's activities and the practices of the Luxembourg tax authorities to the journalist E.P. ..., and to set out in detail the various steps of the reasoning they had followed" (see paragraph 166 of the present judgment).

The Court states that it will nonetheless apply the review criteria defined in the *Guja* judgment, noting that it has "refined" them, and that the specific features of the present case would require it to make some additional clarifications. It then intends, after first assessing the manner in which the domestic courts implemented the protection afforded to whistle-blowers, to rule on whether this was compatible with the principles and criteria defined in its case-law and, lastly, if necessary, to apply them itself to the present case (see paragraph 158 of the judgment).

***A problem of method.*** It is a fact that in "refining" the *Guja* criteria, the majority substantially modify them. In particular, they give a completely new content to the fundamental concept of the public interest inherent in the disclosed information and, in particular, to the detriment caused, thereby adopting a new interpretation of the damage caused not only to the employer but also to the public interest. This in itself is not a problem, since the Court has on several occasions in the past amended its case-law and then applied the new criteria to the facts that the domestic courts had assessed from the standpoint of its previous case-law. Thus, for example, in the case of *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, ECHR 2009) the Grand Chamber, after changing its approach with regard to the *non bis in idem* rule, immediately applied the new criteria to the facts of that case.

In the present case, the majority apply the new criteria, as a first step, not to the facts of the case, but to the Court of Appeal's reasoning. However, given the fundamental change made to the assessment criteria, it would be practically a quirk of fate if, having conducted their balancing exercise in accordance with the old *Guja* criteria*,* the domestic courts had reached a conclusion corresponding to the prism of the amended criteria. From this perspective, it would have been more logical for the Grand Chamber to begin immediately by conducting its own balancing exercise and then to determine whether, in the light of that exercise, the outcome reached by the domestic courts in applying the old criteria was still justified.

Instead, the judgment applies – at least in part – the newly formulated criteria to the checklist used by the domestic courts and, at the close of this review, concludes that the latter's weighing-up of the respective interests does not correspond to these new requirements, before then carrying out its own balancing exercise (see paragraph 201 of the present judgment) – something that it could and should have done from the outset, without performing this unnecessary step.

***A possible solution: temporal adjustment of the effects of the Court's judgments.*** Although the judgment may claim to "clarify" the principles identified in the *Guja* case-law*,* in reality it does not seem excessive to speak of a departure from the case-law. Since the Court's judgments have declaratory, and therefore retrospective, effect, the inevitable consequence is that those domestic courts which have applied the Court's case-law as it stood at the time of their judgments will inevitably be at odds with the new criteria.

In the present case, this has led to the finding of a violation of the Convention, in spite of the Court of Appeal's faithful application of the Court's case-law.

In order to avoid the undesirable consequences of this state of affairs, the Court, like other international and national courts (see, for example, the Court of Justice of the European Union and a number of the highest national courts), could consider instituting the possibility of temporal adjustment of the effects of its judgments.

***The balancing exercise.*** As regards the balancing exercise conducted in the light of the new criteria, it might be questioned whether the majority have taken sufficient account of the specific facts of the case and whether they have respected the margin of appreciation afforded to the national authorities in this area (see paragraph 110 of the judgment, which cites the Court's relevant case-law).

***The context: three defendants.*** The facts of the case must be considered as a whole, since the domestic courts tried the three defendants, namely A.D., E.P. and the applicant, simultaneously. E.P., the journalist, was immediately acquitted. Even A.D., who had clearly been acting in bad faith (he had stolen and retained the ATAs that were subsequently communicated to the journalist for one year before handing them over, awaiting the time that they could best serve *his own* interests) was acquitted, since the domestic courts found that, in the light of the six *Guja* criteria, interpreted broadly, he should be granted whistle-blower status. The Court of Appeal noted, in particular, that the impugned disclosures were a matter of public interest, in that they had "opened the door to public debate in Europe and in Luxembourg on ... taxation ... of multinational companies, tax transparency, the practice of ATAs and tax fairness in general" and noted that, following the *Luxleaks* revelations, the European Commission had presented a package of measures against tax evasion and an action plan for fair and efficient corporate taxation in the European Union (see paragraph 32 of the judgment). The domestic courts cannot therefore be accused of any lack of sufficient willingness to protect whistle-blowers, as indeed the judgment expressly acknowledges (see paragraph 166).

***The judgment's three criticisms with regard to the domestic courts.*** Applying the new criteria to the facts that had been analysed by the national courts in accordance with the previous *Guja* criteria, the judgment levels three main criticisms at those courts, namely: (a) that they erred in considering that the information disclosed by the applicant was neither essential nor new; (b) that, faced with the disclosure of information that it holds to be of public interest, they had not correctly placed "on the other side of the scales all of the detrimental effects that ought to have been taken into account" (see paragraph 200 of the judgment); and, lastly (c) that they had incorrectly assessed whether or not the criminal penalty imposed on the applicant was proportionate (see paragraph 205 of the judgment).

***The domestic courts' assessment of the value of the documents handed over by the applicant.*** It appears from the facts (see, in particular, paragraph 14 of the judgment) that following the media revelations about certain of the ATAs stolen by A.D., the applicant (whose case was examined in the same judgment as those of A.D. and E.P.) contacted the journalist in his turn, offering to supply further documents. Ultimately, sixteen documents, including fourteen tax returns by multinational companies, were handed over. It appears from the first-instance judgment that the applicant claimed to have contacted the journalist "to assist him in his investigation, since he had seen the 'Cash investigation' programme and had thought that [such] financial arrangements were illegal, and they had shocked him." It also appears that his choice had been guided solely by how well-known the companies in question were. It does not seem an exaggeration to state, and this was certainly the view of the domestic courts, that the applicant very much wished to take part in the *Luxleaks* revelations but that he had little to offer; he had to content himself with offering the journalist, who needed some persuasion, tax returns that, in the view of the domestic courts, had "neither contributed to the public debate on the Luxembourg practice [of ATAs], [nor] triggered a debate on tax evasion [nor] provided essential, new and previously unknown information".

***Criticism of the argument on essential, new and previously unknown information.*** In assessing whether or not the national courts exceeded their margin of appreciation, the judgment notes that "the sole fact that a public debate on tax practices in Luxembourg was already underway when the applicant disclosed the impugned information cannot in itself rule out the possibility that this information might also be of public interest, in view of this debate, which had given rise to controversy as to corporate tax practices in Europe and particularly in France ..., and the public's legitimate interest in being apprised of them" (see paragraph 184 of the judgment).

However, the criterion of essential, new and previously unknown information was not the only one used by the Court of Appeal in finding that the information was of insufficient interest to enable the applicant to be granted whistle-blower status; the Court of Appeal also held that other criteria, namely the contribution to a public debate on ATAs and the triggering of a debate on tax evasion, had not been fulfilled. Thus, the judgment fails to do justice to the Court of Appeal's reasoning.

***The assessment of the respective interests in issue.*** Whether under the traditional or enriched *Guja* assessment criteria (this is immaterial here), the judgment criticises the national courts for failing to take into account all of the harmful effects caused by the applicant's disclosures. To that end, it emphasises that, over and above the reputational damage sustained by his employer, PwC, which it does not deny (see paragraph 194), the national courts failed to take into account two other forms of damage. These are, firstly, the damage caused to PwC's clients, since the disclosures concerned

their situations and were liable to have an impact on their own reputations (see paragraph 196 of the judgment); secondly, the judgment highlights, in particular, the damaging effect on the public interests involved, especially professional secrecy, the "aim [of which] is to ensure the credibility of certain professions by fostering a relationship of trust between professionals and their clients". It adds that it "is also a principle of public policy, breach of which may be punishable under criminal law" (see paragraph 197). The judgment thus criticises the Court of Appeal for having taken into consideration only the damage sustained by PwC, "the extent of which it did not assess in terms of that company's business or reputation" and it notes that by neglecting "the harm also caused to the private interests of PwC's customers and to the public interest in preventing and punishing theft and in respect for professional secrecy, the Court of Appeal thus failed to take sufficient account, as it was required to do, of the specific features of the present case" (see paragraph 201 of the judgment).

***The surprising conclusion with regard to the balancing exercise.*** Having regard to the substantial weight added to the "other side of the scale", grouping together the various forms of damage caused by the disclosure, it is all the more surprising to note that the judgment, after conducting its own balancing exercise of the interests involved, concludes that the public interest, characterised by "the importance, at both national and European level, of the public debate on the tax practices of multinational companies, to which the information disclosed by the applicant has made an essential contribution", prevails over the entirety of the detrimental effects. This comes after the Court has repeatedly stressed that it "cannot overlook the fact that the impugned disclosure was carried out through the theft of data and a breach of the professional secrecy by which the applicant was bound" (see paragraph 202 of the judgment). It should be added that, following a detailed examination of the disclosed documents, the national courts, differentiating between the situations before them, had held that the documents revealed by A.D. had made an essential contribution to the public debate concerning the tax practices of multinational companies, but that this was not the case for the documents disclosed by the applicant. In this context, it might be reiterated that the interest of the disclosure diminishes depending on whether it belongs to the first, second or third category. Here, however, we are clearly not in the first category.

***The severity of the sanction.*** With regard to the severity of the sanction, the judgment considers that having regard "to the nature of the penalties imposed and the seriousness of the effects of accumulating them, in particular their chilling effect on the freedom of expression of the applicant or any other whistle-blower, an aspect which would not appear to have been taken into account in any way by the Court of Appeal, and especially bearing in mind the conclusion reached by it after weighing up the interests involved, ... the

applicant's criminal conviction cannot be regarded as proportionate in the light of the legitimate aim pursued" (see paragraph 205 of the judgment).

***The dismissal.*** What penalties were in fact imposed? Firstly, a dismissal *with* notice, after the applicant had admitted the facts and had given his agreement to the registration of a mortgage of 10 million euros on his assets. Can we speak of a penalty in this context? Certainly, had the applicant been dismissed without notice. Here, the measure is more a reflection of a loss of trust between the parties which is more akin to a divorce "by mutual consent". The authorisation for registration of a 10-million-euro mortgage is also indicative of the feeling, shared by the parties at that particular time, that the damage caused to PwC was very substantial, something that was only subsequently shown to be untrue.

***The fine.*** The charges against the applicant which were examined by the Court of Appeal carried an optional sentence of 3 months to 5 years' imprisonment and a mandatory fine of 251 to 5,000 euros. The Court of Appeal stated as follows: "David HALET does not fulfil the criterion of the balancing of the interests in issue and, accordingly, cannot benefit from the full protection of Article 10 of the Convention, but can rely only on a lesser protection, reflected, under Luxembourg law, in recognition of mitigating circumstances." Accepting the defendant's good faith, it limited itself to imposing a fine of 1,000 euros (unlike the first-instance court, which had sentenced him to 9 months' imprisonment, suspended in full).

Such a penalty cannot be considered as intrinsically disproportionate. It appears so only if one concludes that no criminal sanctions at all should have been imposed on the applicant. This is the conclusion reached in the judgment (see paragraphs 204 et seq.). However, we might query whether, in so doing, the judgment has not deprived the "sanction" criterion of its autonomous nature, making it instead one aspect of the criterion which entails balancing the interest of the information disclosed against its harmful effects.

***Conclusion.*** Noting that the domestic courts took into consideration all of the evidence in this case, including the factual context (involving several persons claiming whistle-blower protection), that they carefully took into account the criteria laid down by the Court in its *Guja* case-law and that they weighed up all of these elements, we are profoundly of the opinion that, in refusing the applicant the full protection of whistle-blower status, these courts remained within their margin of appreciation and were not in breach of Article 10 of the Convention.

# STATEMENT OF DISSENT BY JUDGE KJØLBRO

I voted against the finding of a violation of Article 10 of the Convention (point 1 of the operative provisions).

On two points, I distance myself from the Court's reasoning in the judgment.

Firstly, I do not support the Court's further development of the general principles in respect of the so-called "second *Guja* criteria", namely "the public interest in the disclosed information" (see paragraphs 131 to 144), where the Court extends the protection granted to whistle-blowers to cover not only (i.) "illegal conduct" (the term used in the *Guja* judgment) or "unlawful acts" (the term used in the present judgment) and (ii.) "wrongdoing" (the term used in the *Guja* judgment) or "reprehensible acts" (the term used in the present judgment), but also to cover (iii.) "a matter that sparks a debate giving rise to controversy as to whether or not there is harm to the public interest" (see, in particular, paragraphs 138 and 140 of the present judgment).

Secondly, and in consequence, I cannot agree with the majority when this new general principle is applied to the specific circumstances of the present case.

Despite my disagreement of principle, I will refrain from further developing my legal arguments. I have therefore limited myself to this "declaration of vote".