



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

THIRD SECTION

CASE OF HALET v. LUXEMBOURG

(Application no. 21884/18)

JUDGMENT

Art 10 • Freedom of expression • Criminal fine of EUR 1,000 for disclosing to the media confidential documents from a private-sector employer (“Luxleaks”), of insufficient public interest to counterbalance the harm caused • *A priori* whistle-blower within the meaning of the Court’s case-law • Proportionality of the penalty • Fair balance struck between the competing interests through a detailed analysis by the domestic courts

STRASBOURG

11 May 2021

Referral to the Grand Chamber

06/09/2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Halet v. Luxembourg,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Paul Lemmens, *President*,

Georgios A. Serghides,

Georges Ravarani,

María Elósegui,

Darian Pavli,

Anja Seibert-Fohr,

Peeter Roosma, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the 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;

the decision to give notice to the Luxembourg Government (“the Government”) of the complaint concerning Article 10 of the Convention and to declare inadmissible the remainder of the application;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments received from the association *Maison des lanceurs d’alerte*, which had been granted leave to intervene by the President of the Section to which the case was initially allocated,

Noting that the French Government, invited, if they so wished, to submit written observations (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court) in view of the applicant’s nationality, had informed the Court that they did not intend to avail themselves of the right of intervention,

Having deliberated in private on 30 March 2021,

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

INTRODUCTION

1. The case concerns the applicant’s criminal conviction in the context of the so-called *Luxleaks* case, in which the domestic courts rejected his argument that he had acted as a whistle-blower. He relies on Article 10 of the Convention.

THE FACTS

2. The applicant was born in 1976 and lives in Viviers. He was represented by Mr C. Meyer, a lawyer practising in Strasbourg.

3. The Luxembourg Government (“the Government”) were represented successively represented by an *ad hoc* Agent, Mr Christophe Schiltz, Head of the Legal Department of the Secretariat General at the Ministry of Foreign Affairs, and subsequently by their Agent, Mr David Weis, of the Permanent Representation of Luxembourg to the Council of Europe.

I. THE BACKGROUND TO THE CASE

4. The applicant was employed by the company PricewaterhouseCoopers (“PwC”), which provides auditing, tax advice and management consultancy services.

PwC’s activity consists, in particular, in drawing up tax declarations in the name and on behalf of its customers, and in requesting advance tax rulings from the tax authorities. These rulings, which concern the application of fiscal law to future operations, are known as “Advance Tax Agreements” (“ATAs”), “tax rulings” or “tax rescripts”. They are referred to below as tax rescripts.

5. The applicant submits that, while employed by PwC, he coordinated a five-person team and held a post which was not minor, but, on the contrary, was at the heart of PwC’s activity, which consisted in obtaining the best possible treatment for its clients from the Luxembourg tax authorities. This description is challenged by the Government which, relying on the findings that the trial court in the present case would reach, submit that, at the relevant time, the applicant carried out the tasks of an administrative employee, and that his duties consisted in gathering, centralising, scanning, saving and dispatching tax declarations to the clients concerned.

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

7. An internal investigation by PwC established that on 13 October 2010, the day before he left PwC 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 tax rescripts. He had handed these over to a journalist, E.P., in the summer of 2011, at the latter’s request.

8. A second internal investigation by PwC led to the applicant’s identification. Following the media’s disclosures about certain of the tax rescripts copied by A.D., the applicant had contacted E.P. in May 2012, offering to hand over other documents. The journalist eventually agreed to this offer, and the sixteen documents, specifically fourteen tax declarations and two covering letters, were handed over between October and December

2012. Some of these documents were used by the journalist in a second television programme, *Cash Investigation*, broadcast on 10 June 2013, a year after the first broadcast. On 5 and 6 November 2014 the sixteen documents were also put online by an association of journalists known as the “International Consortium of Investigative Journalists” (“ICIJ”). Its authors described this publication as “*Luxleaks*”. It appears from press articles that the *Luxleaks* affair led to “a difficult year” for PwC, but that, once this period had passed, the company experienced a growth in turnover which was accompanied by a significant increase in its workforce.

II. THE CRIMINAL PROCEEDINGS BROUGHT IN THE CASE

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

A. The first-instance judgment

10. On 29 June 2016 the Luxembourg District Court, ruling on major offences, 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, betrayal of commercial secrets, breach of professional confidence and laundering and possession (*blanchiment-détention*).

11. 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. In addition, they were ordered to pay a symbolic sum of one euro to PwC as civil-law compensation in respect of non-pecuniary damage, PwC having limited its claim as the civil party to that amount.

12. E.P. was acquitted, on the grounds that he had not taken part, for the purposes of the law, as a co-perpetrator or accomplice, in the applicant’s betrayal of commercial secrets or breach of professional confidence.

B. Judgment of the Court of Appeal

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

14. On 15 March 2017 the Court of Appeal of the Grand Duchy of Luxembourg delivered its judgment.

15. Before analysing the merits of the case, the Court of Appeal noted that “[the applicant’s] public accusations, through communication of the tax declarations [of multinational companies], [were] related to the practice,

initially criticised by [A.D.], of issuing tax rescripts that [were] advantageous to these multinational companies”. In the same context, it also stated that “under the case-law of the European Court of Human Rights, the lawfulness or illegality of the disclosed act or conduct is not a criterion in deciding whether to grant whistle-blower status, since the disclosed information might even concern *a particular shortcoming or questionable practices...*”.

16. As to the merits, the Court of Appeal decided, for various reasons related to the domestic criminal law, not to examine certain charges brought against A.D. or the applicant, namely breaching commercial secrecy, or, accordingly, laundering and possession, or laundering and possession of the proceeds of computer-related fraud.

17. It ruled that, in the light of the domestic criminal law alone, 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 or retained access to a data processing or automatic transmission system, breach of professional confidence and laundering and possession of the proceeds of theft from one’s employer. It held that, contrary to the findings of the first-instance court, E.P. ought to have been regarded as complicit in the breach of professional confidence committed by the applicant, and in the laundering and possession of the proceeds of theft from one’s employer, also committed by him.

18. The Court of Appeal then examined whether or not these offences, which had been established and were in principle to be considered as proven, could be held to be justified under Article 10 of the Convention. It explained that under Luxembourg law the acceptance of whistle-blowing as a defence, derived from Article 10 of the Convention, had the effect of neutralising the illegal nature of the breach of the law. It specified that it was the statutory element of the offence – which was necessarily committed through the disclosure, in good faith and in a proportionate and appropriate manner, of information in the general interest – which was thus neutralised and led to the defendant’s acquittal.

19. With regard to E.P., it held that he was to be recognised as enjoying the defence of having acted as a responsible journalist, derived by the Court from Article 10 of the Convention. In consequence, it confirmed, on this ground, E.P.’s full acquittal.

20. With regard to A.D. and the applicant, it applied 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. Its reasoning may be summarised as follows.

1. Analysis of the first four Guja criteria

21. The Court of Appeal noted, in application of this case-law, that the revelations were in the public interest (the first criterion), 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 tax rescripts and tax fairness in general”. It added that, following the *Luxleaks* disclosures, the European Commission had presented a range of measures against tax evasion and an action plan for fair and effective corporate taxation in the European Union.

22. The Court of Appeal also held that the information disclosed had been authentic (the second criterion).

23. With regard to the third criterion, namely that disclosing the information to the public could only be considered, as a last resort, where it was clearly impracticable to do otherwise, the Court of Appeal considered that, having regard to the circumstances of the case, informing the public through the media had been “the only realistic alternative in order to raise the alert”.

24. It accepted that the fourth criterion, that of good faith, had been met in the applicant’s case.

In the case of A.D., it held that this criterion had been complied with in the summer of 2011, when he handed over the documents which he had taken in October 2010 to E.P. In contrast, it held that A.D. had not complied with this criterion when taking possession of the documents, given that he had not yet intended at that point to make them public.

2. *Analysis of the fifth Guja criterion*

25. The Court of Appeal then analysed the criterion which required the public interest in obtaining the information to be balanced against the harm suffered by the employer as a result of the information revealed (the fifth criterion).

26. In so far as the applicant argued that PwC had not suffered any harm, pointing out that the company had even announced an increase in its turnover and number of employees, the Court of Appeal – after reviewing the Court’s various judgments in this area – noted as follows:

“... the European Court does not analyse the harm sustained in specific terms, but considers that the harm caused to the employer may result from damage to its image, loss of confidence, and, in general, from the impact that the report may have had on the public. The higher the public profile of the case, and thus of the information that the employer wished to keep secret, the more the public’s confidence is shaken.”

It also stated:

“There is accordingly no need to ascertain whether, as a result of [A.D.’s] and [the applicant’s] disclosures, PwC’s turnover has decreased or whether clients have complained, brought civil-liability proceedings or closed their accounts with PwC.

The Court of Appeal notes that the fact of disclosing documents subject to business and professional secrecy has certainly caused harm to PwC, specifically non-pecuniary harm as a victim of criminal offences, resulting from the damage to its reputation and the loss of client confidence with regard to the security procedures in place in the company.”

Furthermore, and more specifically in the context of the information provided concerning the applicant, it pointed out that:

“In the present case, PwC has been associated with a practice of tax evasion, if not with a tax-optimisation procedure described as unacceptable. It has been the victim of criminal offences and has necessarily suffered harm”.

27. It went on to weigh up the public interest, on the one hand, against PwC’s interests on the other, and found, with regard to A.D., that the public interest clearly outweighed any harm that may have been sustained by PwC and its clients. It therefore held that this criterion had been complied with in respect of A.D.

28. In contrast, in the applicant’s case, the Court of Appeal held that the disclosure of the documents had caused PwC harm that was greater than the general interest, with the result that the fifth criterion had not been fulfilled. It found that the defence argument that the applicant should be granted whistle-blower status could not be accepted, for the following reasons:

“The documents handed over by [the applicant] to the journalist did not ... contribute to the public debate on the Luxembourg practice of [tax rescripts], trigger [a] debate on tax evasion or provide essential, new and previously unknown information.”

29. In reaching this conclusion, it relied on the following arguments.

30. In contrast to the documents disclosed by A.D., the documents selected by the applicant were not administrative rulings and did not illustrate the application of the tax rescripts system. They were simple tax declarations – that is, unilateral statements by taxpayers concerning their financial situation – which did not permit the tax authorities’ attitude towards them to be ascertained. Thus, these documents did not reveal any information about the tax optimisation technique and were of limited relevance.

31. Nor had they been selected by the applicant in order to provide additional information about the tax rescripts already in the possession of E.P., for example in order to illustrate how these tax rescripts were reflected in the [corresponding] tax declarations. They had been selected solely on the basis of how well-known the relevant taxpayer was.

32. When the applicant appropriated the documents and transmitted them to the journalist, the practice of tax rescripts had already been disclosed through the documents which were transmitted by A.D. and publicised on the occasion of the first *Cash Investigation* programme. The applicant had been aware of this circumstance.

33. Thus, there had been no compelling reason for the applicant to commit a fresh violation of the law by appropriating and disclosing confidential documents.

34. The documents had been used by E.P. to prepare, as part of the second *Cash Investigation* programme, a section on tax evasion and the “billions we are missing”, rather than on the practice of tax rescripts. The documents were used to illustrate tax evasion by two groups of multinational companies, A. and A.M., explored in the report.

According to E.P., in the case of company A. the tax declarations had allowed him to illustrate that the group had declared a significant turnover in Luxembourg without, however, engaging in the corresponding commercial activity in that country.

The journalist criticised the following procedure with regard to company A.M. He reported that this group had transferred EUR 173 million to a subsidiary, governed by Luxembourg law, in order to repay the interest on a loan that it had granted to this subsidiary. The subsidiary was able to deduct the amount in question, which was then transferred to another company in the same group, located in Dubai, where it enjoyed full tax exemption.

The Court of Appeal considered that the information in relation to the two groups of companies could admittedly be regarded as alarming and scandalous, but that it did not constitute essential or fundamentally new information. Thus, it concluded that the tax returns handed over by the applicant merely confirmed the result of the journalistic investigation carried out by E.P.’s team and that “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”.

3. *Analysis of the sixth Guja criterion*

35. With regard to the sixth criterion, concerning the proportionality of the penalty, the Court of Appeal made a distinction between the two defendants.

It held that A.D., who was entitled to rely on the defence of whistleblowing with regard to the offence of handing over the documents to the journalist E.P. in the summer of 2011, was to be absolved of any criticism with regard to those events, and thus acquitted of the offence of a breach of professional secrecy. With regard to those of his actions that were not covered by this defence, namely those concerning the appropriation of documents in October 2010, the Court of Appeal reduced the prison sentence to six months, suspended in its entirety, and upheld the fine of EUR 1,500.

With regard to the applicant, 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 doubled, namely a prison term of between three months and five years, and a fine of EUR 251 to 5,000. Noting also that the applicant could not benefit from the defence of having acted as a whistle-blower, it decided nonetheless to have regard, as an extenuating circumstance, to “the motive, honourable in his view, which [had] driven him to act”, and to “the disinterested nature of his acts”. In consequence, it decided not to impose a prison term and to maintain the fine of EUR 1,000.

36. 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.

i. The Court of Cassation’s judgments in respect of A.D. and the applicant

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

1. The Court of Cassation’s judgment in respect of the applicant

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

39. The applicant had submitted a legal argument alleging a violation by the Court of Appeal of Article 10 of the Convention, stating, *inter alia*:

“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 harm suffered by the employer was greater than the general interest and to reject the defence of whistle-blowing, given its conclusion that the criterion of the proportionality of the harm caused in relation to the general interest was not fulfilled.”

In the “discussion of the argument”, the applicant had emphasised, by way of example, that the appendices to the tax returns filed by group A. (see paragraph 34 above) referred to annual general meetings which had an average duration of one minute, which sufficed to demonstrate a total lack of genuine substance in Luxembourg. He stressed that the tax returns that he had communicated made it possible to verify the economic reality of the entity set up in Luxembourg and thus to analyse the practice of using tax rescripts.

40. In response to this argument, the Court of Cassation held, *inter alia*:

“... 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 judges invested with jurisdiction over the merits, and is not subject to review by the Court of Cassation, provided that this assessment is not deduced from reasons 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 in question, 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 reasons that were adequate and free from contradiction; ...”

2. The Court of Cassation's judgment in respect of A.D.

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

42. In its judgment (no. 1/2018, Criminal Division) of 11 January 2018, it quashed the Court of Appeal's judgment on the grounds that whistleblower status ought in principle to be granted concerning all offences for which a person who had availed himself or herself of the right guaranteed by Article 10 of the Convention was prosecuted, failing which the protection that ought to arise from whistle-blower status would be rendered ineffective. The Court of Cassation thus held that the Court of Appeal had infringed Article 10 of the Convention by refusing to allow A.D. to rely on the defence of whistle-blowing regarding the appropriation of the documents handed over 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.

D. The Court of Appeals' remittal judgment with regard to A.D.

43. In a judgment of 15 May 2018, the Court of Appeal held that, following the Court of Cassation's judgment, A.D. ought to be acquitted, on the basis of Article 10 of the Convention, of all the offences committed with regard to the documents handed over to E.P. in the summer of 2011, including the offences related to the appropriation of these documents in October 2010.

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

44. This judgment was accepted by the parties, and consequently became final.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW

45. The various offences with which the applicant was charged are provided for in the Criminal Code.

46. Thus, the provisions on theft from one's employer (*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 an 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.”

47. With regard to fraudulent retained access in an automated data processing system, Article 509-1 § 1 provides that:

“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.”

48. The offence of a breach of professional secrecy is provided for in Article 458, 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.”

49. Laundering and possession of the proceeds of theft from one's employer is provided for 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 that:

“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.”

II. EUROPEAN UNION LAW

50. Directive (EU) 2016/943 on the protection of trade secrets was adopted on 8 June 2016. Under Article 6 of this Directive, the States are invited to include in their legislation “measures, procedures and remedies” in order to enable trade secret owners to prevent or obtain redress for “the unlawful acquisition, use and disclosure of trade secrets”. However, recital 20 of this Directive indicates that these measures, procedures and remedies “should not restrict whistleblowing activity”; it further specifies that “the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed. This should not be seen as preventing the competent judicial authorities from allowing an exception to the application of measures, procedures and remedies in a case where the respondent had every reason to believe in good faith that his or her conduct satisfied the appropriate criteria set out in this Directive”.

51. Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law was subsequently adopted on 23 October 2019. This Directive, which is intended to protect whistle-blowers who report breaches of European Union law in a range of areas, such as public procurement, financial services, prevention of money laundering or public health, is due to be transposed by the member States into their respective legal orders by 17 December 2021 at the latest.

III. INTERNATIONAL MATERIALS

A. The United Nations

52. In his report A/70/361 of 8 September 2015, David Kaye, 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.

53. In his opinion, the term “whistle-blower” refers to “a person who exposes 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, such as a violation of national or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety”. D. Kaye also specified that “[w]histle-blowing does not always involve specific individual wrongdoing, but it may uncover hidden information that the public has a legitimate interest in knowing”.

54. On 24 January 2017 UN Secretary-General António Guterres approved an updated UN whistle-blower protection policy, with the intention of “enhancing protection for individuals who report possible misconduct or cooperate with duly authorised audits or investigations”.

B. The Council of Europe

55. In the judgments in the cases of *Heinisch v. Germany* (no. 28274/08, § 37, ECHR 2011 (extracts)) and *Bucur and Toma v. Romania* (no. 40238/02, § 63, 8 January 2013), the Court summarised Resolution 1729 (2010) on the protection of “whistle-blowers”, adopted by the Parliamentary Assembly of the Council of Europe on 29 April 2010.

56. Another instrument was adopted in this area by the Committee of Ministers of the Council of Europe on 30 April 2014. Certain relevant passages from that Recommendation (CM/Rec(2014)7) were set out in the case of *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* ([GC], no. 17224/11, § 44, 27 June 2017).

This Recommendation considers that a “whistle-blower” is 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”.

57. On 23 June 2015 the Parliamentary Assembly of the Council of Europe adopted Resolution 2060(2015) and Recommendation 2073(2015) on “improving the protection of whistle-blowers”.

In the first of these texts, the Parliamentary Assembly referred to the “disclosures concerning mass surveillance and intrusions of privacy carried out by the United States National Security Agency (NSA) and other intelligence agencies” and called for the adoption of a “binding legal instrument (convention) on whistle-blower protection on the basis of Committee of Ministers Recommendation CM/Rec(2014)7...”.

In the second text, the Parliamentary Assembly invited the Committee of Ministers to “promote further improvements for the protection of whistle-blowers by launching the process of negotiating a binding legal instrument in the form of a framework convention that would be open to non-member States and cover disclosures of wrongdoings by persons employed in the field of national security and intelligence”.

58. On 1 October 2019 the Parliamentary Assembly of the Council of Europe adopted Resolution 2300(2019) and Recommendation 2162(2019) on “Improving the protection of whistle-blowers all over Europe”.

In the first of these documents, the Parliament Assembly strongly welcomed Directive (EU) 2019/1937 (see paragraph 51 above) and invited the member States of the Council of Europe which are also members of the European Union to adopt its provisions, adding that there was nothing to prevent them from protecting those reporting on breaches or abuses of their national law according to the same principles. As to the Council of Europe member States which are not members of the EU, the Parliamentary Assembly invited them to revise their relevant legislation in this area or pass new laws that draw on the proposal for a European directive in question.

In the second text, the Parliamentary Assembly reiterated its invitation to the Committee of Ministers to begin preparations for negotiating a binding legal instrument in the form of a Council of Europe convention, which should draw on the above-mentioned European directive, taking due account of the clarifications and additions proposed in Resolution 2300 (2019). In its reply, adopted on 22 April 2020, the Committee of Ministers reiterated, with regard to the Assembly’s recommendation that a legally binding instrument be drawn up, the position set out in its reply to Assembly Recommendation 2073 (2015). It considered that “given the complexity of the subject and the range of solutions adopted by the member States to protect whistle-blowers, ... the negotiation of a binding instrument, such as a convention, would be time consuming and there would be no certainty as to its outcome”, and that it was “at this stage ... more appropriate to encourage States fully to implement the recommendations which have been adopted by the Committee of Ministers or other bodies ...”.

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

59. The applicant alleged that his conviction, following his disclosure to a journalist of sixteen documents emanating from his employer, PwC, had amounted to disproportionate interference with his right to freedom of expression. He relied on 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

A. Admissibility

60. The Government raised an objection of inadmissibility, arguing that the application was manifestly ill-founded. They rejected the applicant’s claim that, among other points, the Court of Appeal had “ruled that it was possible to circumvent the Court’s case-law regarding violations of Article 10 [of the Convention]”, and had “merely pretended to weigh up the interests”. Referring to certain passages in the impugned judgment, the Government explained that the Court of Appeal had reiterated that it was obliged to give full effect to Convention and had then applied the Court’s case-law. They considered the applicant’s assertion to be manifestly erroneous and invited the Court to declare the application inadmissible in application of Article 35 § 3 (a) of the Convention.

61. The applicant submitted in reply that, through this argument, the Government analysed in detail the weighing up of interests conducted by the domestic courts, a matter which went to the merits of the case. He added that the Government, while recognising the existence of interference with the right protected by Article 10 of the Convention (see paragraph 76 below), could not then contradict themselves by raising an objection arguing that the complaint - which, moreover, they recognised as being well-founded in part - was manifestly ill-founded. He therefore asked that the objection raised by the Government be joined to the merits of the case and then be rejected.

62. The Court considers that the argument in question raises questions which require examination on the merits of the complaint under Article 10 of the Convention, rather than an examination of the admissibility of the complaint (see, *mutatis mutandis*, *Gürbüz and Bayar v. Turkey*, no. 8860/13, § 26, 23 July 2019).

63. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. The Court therefore declares it admissible.

B. Merits

1. The parties' submissions

(a) The applicant

64. The applicant, who had indicated in his application that he was “at the origin of the *Luxleaks* case”, took note of the Government’s acknowledgment that there had been an interference with his right to freedom of expression.

65. He considered that the legal question centred on the proportionality of the interference.

66. He submitted, firstly, that the Government were “attempting to carry out ... an innocent and objective transformation” of the facts when asserting that the tax returns handed over by the applicant were “mere statements by the taxpayer”. The applicant submitted that these were, on the contrary, legal documents - drawn up and drafted by PwC on behalf of its clients and invoiced to them - which “demonstrate[d] the concrete existence of the tax arrangement contained in the tax rescript (the creation of Luxembourg and offshore companies, movement of capital inside groups, payment of dividends, etc.).

He also made various allegations and criticisms with regard to the Court of Appeal’s judgment.

In his submission, the Court of Appeal had held that “neither the Convention nor Luxembourg law provided for an exemption from criminal prosecution for whistle-blowers, ... with the result that Article 10 allowed only for a finding that prosecution was not necessary in a democratic society, without allowing the accused to be acquitted [*“relaxer”*, in Luxembourg law]”.

By “holding that the public interest in learning the information handed over by [him] was weaker than the damage caused to [PwC]”, the Court of Appeal – and this finding had been endorsed by the Court of Cassation – had “denied him ... the protection of whistle-blower status”. Since the Court of Appeal had “judged that the compensation to be paid to the employer was

... a symbolic euro”, the balancing exercise “thus presupposed that the public interest in knowing the information in question was, in this case, less than one symbolic euro, that is, equal to zero. However, as the Court of Appeal had not claimed that the value of the information provided by the applicant was non-existent, it had “only pretended to balance the interests”.

The domestic courts had “noted that there was indeed a defence ground in the present case which could have led to the applicant’s acquittal, but, having regard to the circumstances, they decided that the applicant ... could rely only on a lesser protection, that of an acknowledgement of extenuating circumstances’.

67. There had been no objective reason to distinguish A.D.’s treatment from his, in that they had both been employees and had been equally linked to the document leaks which resulted in the *Luxleaks* scandals. The information revealed by him had “strengthened [A.D.’s] position”.

68. Submitting that his “criminal conviction could have been motivated by only one concern: its deterrent function”, he considered that the existence of this penalty was, in itself, sufficient to justify the finding of a violation of Article 10 of the Convention.

69. Lastly, he “reiterated and endorsed the ... [third-party’s] observations”, which could be summarised as follows.

70. Accepting the three new criteria of “essential, new and previously unknown information”, as the Court of Appeal had done (see paragraph 28 above), would have serious repercussions on the effectiveness of the protection afforded to whistle-blowers.

71. Firstly, the addition of such criteria would result in legal uncertainty.

Thus, the criterion of the “essential” nature of the information disclosed would introduce legal vagueness, since this concept was insufficiently precise. Furthermore, it would be difficult for the courts to apply this criterion, which was unprecedented and absent from any of the laws or case-law in the States which protected whistle-blowers; it would give rise to a range of interpretations.

The criterion of “new” information would result in a reduction in the number of alerts, particularly where an alert concerned information relating to facts that were already known but had not been addressed in the past. The French case of Céline Boussié, who had raised the alert in 2008 about abuse of children with disabilities, which was already known and had been denounced by her former colleagues since the late 1990s, was one example.

Lastly, with regard to the criterion of “previously unknown” information, it might be “necessary in a democratic society” for the disclosure of additional evidence, unknown but helping to draw attention to facts that were previously known and had been denounced, to constitute an ethical warning that deserved protection under Article 10 of the Convention.

72. Secondly, it would be impossible in practice for whistle-blowers to fulfil these new criteria.

The six criteria adopted by the Court – none of which referred to assessment of the new, essential or previously unknown nature of the relevant information – had enabled a satisfactory balance to be struck between the interests of employers and the public’s right to information.

This approach by the Court was compatible with the existing international standards and, in particular, with the European Directive adopted in this area, which, as a general rule, required only a “reasonable belief” in the accuracy of what was being complained about, excluding any prior assessment of whether the information was new, previously unknown or essential.

Moreover, this approach was appropriate in terms of the profiles of whistle-blowers who, in a world of digital networks, had extremely easy access to a very large amount of information. In this context, the model of the *Guja* case-law was a safeguard against illegal leaks, in that it made it possible to guarantee that the information disclosed was genuinely in the public interest. However, if whistle-blowers were persuaded that they could no longer be protected, they would be encouraged to leak information anonymously.

73. Furthermore, the new criteria used by the Court of Appeal would, as an indirect effect, weaken the States’ obligation to investigate violations of human rights.

The public authorities would thus be relieved of their responsibility to conduct investigations into the facts disclosed by whistle-blowers and to decide on whether or not it was appropriate to prosecute the presumed offenders. Where an alert was raised long before the harm emerged and whistle-blowers were therefore unable to ground their allegations on a sufficient factual basis, only an investigation by the public authorities would allow for the entire problem, to which the whistle-blower had only partial access, to be brought to light. Examples from the Court’s case-law showed that protection had been granted to whistle-blowers who had disclosed, without necessarily being able to adduce conclusive proof, information drawing attention to the existence of environmental damage, breaches of the physical integrity of individuals or violations of the rights which contributed to the pluralism typifying societies.

74. Lastly, over and above these problems, the new criteria used by the Court of Appeal would also lead to an interference with the rights of journalists and watchdogs of democracy.

Whistle-blowers were already hesitant to alert the public on account of the possible severe consequences for their personal situation. The adoption of the above-mentioned criteria would have an additional dissuasive effect on journalists’ potential “whistle-blowing” sources. The public-watchdog role of the media could thus be undermined. In many cases, the right of journalists to protect their sources was closely linked to the need to protect the disclosure of information by whistle-blowers. In conclusion, requiring

that the information handed over by whistle-blowers to the press be “essential, new and previously unknown” and denying protection in that connection would necessarily undermine the protection of sources and could deter whistle-blowers from working with journalists.

(b) The Government

75. The Government disputed the applicant’s allegation that he had been “at the origin of the *Luxleaks* case”. According to the Government, it was A.D. who had been the source of the disclosures, both in chronological perspective terms and with regard to the number and nature of the documents disclosed. A.D.’s revelations had illustrated how the tax authorities had dealt with the companies concerned, while, in contrast, those of the applicant had merely been straightforward unilateral tax returns which had not shed light on the practice of tax rescripts. It was the qualitative difference between the documents handed over by A.D. and those transmitted by the applicant which explained why the former had been acquitted while the latter had merely been granted the benefit of extenuating circumstances.

76. However, the Government acknowledged that, given that the applicant had been punished by the criminal and civil courts for having handed over documents to a journalist who subsequently published them, there had been an “interference” with his right to freedom of expression.

77. They noted that the applicant referred only to the issue of the proportionality of the interference and thus did not question the fact that it had been “prescribed by law” and that it pursued a “legitimate aim”.

78. With regard to issue of proportionality, the Government considered that the Court of Appeal had scrupulously analysed the six criteria laid down in the Court’s case-law in this area as they applied to the applicant. They stated that the Court’s assessment could concern only criteria (5) and (6), the only ones in respect of which the applicant challenged the merits of the Court of Appeal’s analysis.

79. The Government began by rejecting the applicant’s assertions that they had “transformed” the facts, pointing out that they had confined themselves to summarising faithfully what they considered to be the relevant findings by the domestic courts.

They also considered it their duty to address the criticisms made by the applicant of the Court of Appeal’s judgment (see paragraph 66 above).

Thus, the applicant had reached his conclusion regarding the failure to acquit him from a citation, taken out of context, of a passage in the Court of Appeal’s judgment, without having regard to the subsequent reasoning. The Government pointed out that, according to the Court of Appeal, even in the absence of a special, express and formal legal provision, an acquittal could be based on a defence ground *sui generis*; and, where a criminal conviction was in breach of the protection granted by the Court under Article 10 of the

Convention, the whistle-blower could benefit from this ground, which had the effect of neutralising the unlawfulness of the breach of the law and would result in a defendant's acquittal.

The applicant had not been denied any protection under Article 10 of the Convention, in that the Court of Appeal had had regard, in imposing the sentence, to the applicant's motives and to the disinterested nature of his actions, which had been recognised as extenuating circumstances. Nor had the judges merely pretended to assess his case, as the applicant claimed. The Court of Appeal, in awarding one symbolic euro in respect of the non-pecuniary damage sustained by the civil party, had not held that the damage sustained by it was limited to one euro. In the civil proceedings, PwC had, for its own reasons, chosen not to claim compensation for pecuniary damage or to attempt to assess the real value of the non-pecuniary damage. Since, under domestic law, the Court of Appeal could not award a sum greater than that claimed, it had thus confined itself to assessing whether the civil party had sustained non-pecuniary damage at least equivalent to the amount claimed. On the other hand, it had given a detailed ruling on the damage suffered by PwC when, in full compliance with the Court's case-law, it had assessed the criterion of how the interests at stake were weighed up.

In so far as the applicant alleged that he had been afforded only "lesser protection" (see paragraph 66 above), the Government replied that, contrary to the applicant's assertions, the Court of Appeal had not found that the circumstances were such as to enable him to rely on the protection of Article 10 of the Convention, but, on the contrary, had found that the applicant was not entitled to benefit from the defence of whistle-blowing (see paragraph 28 above).

80. With regard to the fifth criterion, the Court of Appeal had found, giving relevant reasons, that real and definite harm had been sustained, and had then weighed this against the public interest in being informed of the content of the documents disclosed by the applicant. The Court of Appeal had carried out a detailed analysis of the evidence, holding that the applicant's disclosure of the documents had served neither to supplement A.D.'s prior revelations about Luxembourg's administrative practice of tax rescripts, nor to demonstrate it. The Government also submitted that the relevance of the documents disclosed by the applicant had been limited to enabling the journalist E.P. to illustrate a report describing the fact - which was neither new nor original - that, in order to limit their tax burden, groups of multinational companies were taking advantage of the lack of international harmonisation in the area of tax legislation. Thus, contrary to the disclosures made by A.D., the documents handed over by the applicant had served only to "illustrate the fact, well-known and in itself unexceptional, that companies, in order to reduce their tax burden, structure[d] their assets by creating subsidiaries", but were not relevant "to establish or illustrate that the use of these structures had been approved in

advance by the authorities or to understand the scale, scope and systematic nature of the tax optimisation techniques approved in advance by the authorities in the context of the tax rescripts revealed by *Luxleaks...*”.

81. As to the sixth criterion, the “proportionality of the penalty and its dissuasive effect” had to be “assessed in relation to an individual who did not meet all the criteria for whistle-blower status”. As the Court of Appeal had found that the fifth criterion was not met in the applicant’s case, his situation was different from that of individuals who met all the criteria for being regarded as whistle-blowers.

The Court of Appeal had found that the applicant was entitled to protection under Article 10 of the Convention, although he could not rely on the defence of whistle-blowing. Thus, in application of the Court’s case-law, the Court of Appeal had applied a lower level of protection, by enabling the applicant to benefit from extenuating circumstances. In imposing a sentence that was limited to a relatively low fine, the Court of Appeal had taken into consideration his motives and the disinterested nature of his action. The Government concluded that, in the particular circumstances of the case, the fine could not be considered as either disproportionate nor as having a dissuasive effect on the exercise of the applicant’s freedom of expression, or that of other employees.

(c) The third-party intervener

82. The association *Maison des lanceurs d’alerte*, in its capacity as a third-party intervener, stressed the serious interest of the present case, since it required the Court to rule on the methods of assessing the proportionality of interference with the freedom of expression of whistle-blowers.

83. Through a representative sample of the legal systems which have put in place legislation to protect whistle-blowers, it set out the definitions adopted in this area in the relevant texts. Referring to the Court’s case-law, it emphasised that the only criteria taken into consideration by the Court had never required an assessment of the “essential, new and previously unknown” nature of the information, as had occurred in the present case.

2. The Court’s assessment

(a) The applicable principles

84. The fundamental principles concerning the question of whether an interference with freedom of expression is “necessary in a democratic society” are well established in the Court’s case-law and have been summarised as follows (see, among other authorities, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 187, 8 November 2016):

“(i) 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 ...

(ii) The adjective ‘necessary’, within the meaning of Article 10 § 2, implies the existence of a ‘pressing social need’. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...”

85. More specifically, in the context of the signalling by employees of illegal conduct or wrongdoing observed by them in the workplace, the Court has identified certain fundamental principles underlying the assessment of whether an interference with the right to freedom of expression was proportionate. Thus, the Court must have regard to several factors, namely, the public interest in the disclosed information, its authenticity, the availability of alternative channels for making the disclosure, the employee’s good faith, the damage to the employer and the severity of the penalty (see *Guja v. Moldova* [GC], no. 14277/04, §§ 69-79, ECHR 2008; *Heinisch*, cited above, §§ 62-70; and *Bucur and Toma*, cited above, §§ 92 and 93).

(b) Application of the above-mentioned principles to the present case

(i) Whether there has been an interference

86. It is not disputed between the parties that the applicant’s conviction for having transmitted confidential document to a journalist, who had then published them, constituted an interference in the exercise of his freedom of expression. Reiterating that Article 10 applies to the workplace in general, including when the relations between employer and employee are governed

by private law (see *Heinisch*, cited above, § 44, and the case-law cited therein), the Court considers that the applicant’s conviction amounted to an interference within the meaning of Article 10 § 1.

(ii) *Whether the interference was “prescribed by law” and pursued a legitimate aim*

87. The Court notes that it is not in dispute that the interference was “prescribed by law” and that it pursued a “legitimate aim”. Specifically, the applicant was convicted for having committed various offences provided for in the Criminal Code (see paragraph 45 above), and the purpose of prosecuting and punishing these offences was to prevent the disclosure of confidential information and to protect the reputation of his employer, PwC.

88. It thus remains to be ascertained whether the interference was “necessary in a democratic society”, in particular, whether there was a proportionate relationship between the interference and the aim pursued.

(iii) *Whether the interference was necessary*

(α) Characterisation of “whistle-blower”

89. At the outset, and before analysing whether the interference was necessary, the Court considers it useful to decide whether the applicant could be described as a “whistle-blower”, under the criteria established in its relevant case-law. In the various cases that it has examined in this area, the Court has either explicitly framed the debate in terms of the freedom of expression of whistle-blowers, and concluded that the principles set out in the *Guja* judgment were applicable (see *Heinisch*, cited above, § 64), or it has ruled that the protection of whistle-blowers was not in issue (see, for example, *Rubins v. Latvia*, no. 79040/12, § 87, 13 January 2015, or *Aurelian Oprea v. Romania*, no. 12138/08, § 69, 19 January 2016).

90. In the present case, the Court of Appeal explained that under Luxembourg law the acceptance of whistle-blowing as a defence, derived from Article 10 of the Convention, had the effect of neutralising the illegal nature of the breach of the law. It also specified that in such cases it was the statutory element of the offence – which had to have been committed through the disclosure, in good faith and in a proportionate and appropriate manner, of information of general interest – which was thus neutralised, leading to a defendant’s acquittal (see paragraph 18 above). In the applicant’s case, it had found that he could not rely on the defence of whistle-blowing as defined in domestic law (see paragraph 28 above).

91. The Court considers that it is not its task to express a view as to whether or not the statutory element of the offence of which the applicant was accused should be neutralised, as this is a matter for domestic law alone. To that end, it finds that it is unnecessary to study the related arguments, submitted by the applicant and contested by the Government

(see paragraphs 66 and 79 above). However, it considers that, in order to examine the complaint under Article 10 of the Convention that has been submitted to it, it must assess whether this was a whistle-blowing case in which the principles established in that regard were applicable. In this connection, it points out, firstly, that there was a hierarchical bond between the applicant and his employer, PwC, which entailed a duty of loyalty, reserve and discretion on his part. That duty was a particular feature of the concept of whistle-blowing (see, *a contrario*, *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 80). Secondly, it points out that the applicant had contacted a journalist in order to disclose confidential information obtained in the context of his employment relationship. Taking the view that parallels can be drawn between the applicant's actions and those of the applicants in the above-cited cases of *Guja* and *Heinisch*, the Court finds that the applicant should be regarded, in principle, as a whistle-blower for the purposes of the Court's case-law. In consequence, it must review whether the various criteria established in the *Guja* case-law have been complied with.

(β) Compliance with the criteria established by the *Guja* case-law

92. The Court notes that there is no dispute between the parties with regard to the first four criteria established by the *Guja* line of case-law.

93. The only disagreement concerns the fifth and sixth criteria.

- *As regards the fifth criterion*

94. As regards the fifth criterion, the Court notes that the applicant's right to protection of his freedom of expression is in conflict with the right of his employer, PwC, to protection of its reputation.

95. As the present application requires an examination of the fair balance that has to be struck between these competing interests, the Court will have regard to the following factors.

96. Firstly, where the national authorities have weighed up the interests at stake in compliance with the criteria laid down in the Court's case-law, strong reasons are required if it is to substitute its view for that of the domestic courts (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012).

97. As regards the assessment – in the context of the balancing exercise between the respective interests – of the harm sustained by the employer, the Court has reiterated that there is an interest in protecting the commercial success and viability of companies for the benefit of shareholders and employees, but also for the wider economic good (see *Heinisch*, cited above, § 89). However, with more particular regard to the reputation of a company, the Court has also been careful to state that there is a difference between the reputation of an individual concerning social status, which

might have repercussions on his or her dignity, and the commercial reputational interests of a company, which are devoid of that moral dimension (see *Uj v. Hungary*, no. 23954/10, § 22, 19 July 2011).

98. In the present case, the domestic courts held that the fifth criterion of the *Guja* case-law was not satisfied, since the disclosure by the applicant of documents that were subject to professional secrecy had caused harm to PwC – resulting, in particular, from the damage to the firm’s reputation and the loss of client confidence in its internal security arrangements – that outweighed the general interest (see paragraphs 26 and 28 above). In balancing the interests at stake, the courts thus attributed greater weight to the harm suffered by PwC than to the interest of the disclosures made by the applicant.

99. The Court must dismiss at the outset the applicant’s argument that the Court of Appeal “merely pretended to weigh up the interests at stake” (see paragraph 66 above).

In this connection, it refers, and subscribes, to the exhaustive and convincing explanations provided by the Government (see paragraph 79 above).

The Court of Appeal did indeed assess the non-pecuniary damage sustained by PwC before weighing up the respective interests. However, under domestic law, the Court of Appeal could not award compensation in excess of the amount claimed by the civil party. In fact, it is common practice in Luxembourg for individuals or entities which have sustained non-pecuniary damage, including substantial damage, to waive the right to corresponding monetary compensation. Thus, a civil party will frequently simply seek recognition of the damage sustained as such, which entails requesting a symbolic award of one euro.

Nonetheless, the harm could not be regarded as non-existent simply because PwC had assessed it at one euro (previously the symbolic sum of one franc, worth forty times less). In consequence, the Court sees no inherent contradiction in the fact that the Court of Appeal established on the one hand that damage had been sustained and, on the other hand, fixed the symbolic amount of that damage at one euro.

100. It is undeniable that PwC suffered harm owing to the very fact of the widely reported controversy arising out of the *Luxleaks* case (see, *mutatis mutandis*, *Heinisch*, cited above, § 88). Furthermore, the press coverage confirms that the company “experienced a difficult year” after the situation came to light (see paragraph 8 *in fine* above).

101. However, again according to the media, and this has not been disputed, once the initial difficult period had passed, PwC saw an increase in turnover, coupled with a significant increase in staff numbers (see paragraph 8 *in fine* above). This is a fact that the Court cannot disregard in the context of the present case, particularly in the light of distinction made by it in the above-cited *Uj* judgment (§ 22). Hence, it must be ascertained

whether the damage to the company's reputation was ultimately real and tangible. However, given the increase in its turnover, at least once the first "difficult year" had passed, PwC's financial fortunes do not appear to have suffered lasting harm and there is every indication that its reputation was not definitively compromised, at least not among the companies that make up its client base.

102. The Court concludes from this that while PwC undoubtedly suffered harm in the short term, no longer-term damage to its reputation has been established.

103. In order to continue its examination of how the respective interests were weighed up, the Court must now address the grounds adduced by the domestic authorities as regards the interest of the revelations made by the applicant.

104. In this connection, the Court of Appeal's reasoning, which is central to the issue, is as follows: "... the documents handed over by [the applicant] to the journalist did not ... contribute to the public debate on the Luxembourg practice of [tax rescripts], or trigger [a] debate on tax evasion or provide essential, new and previously unknown information" (see paragraph 28 above).

105. In reasoning in this way, the Court of Appeal took account of a number of factors.

In particular, it noted that that the applicant's disclosures related solely to companies' tax returns, which did not enable any conclusions to be drawn as to the tax authorities' attitude towards those companies. It considered that there was no compelling reason for the applicant to disclose the confidential documents in question, at a time when the practice of tax rescripts had already been revealed by A.D. It specified that the documents disclosed by the applicant – which had been used to illustrate the premise that tax evasion was being practiced by two groups of multinational companies – were certainly useful to the journalist, but did not provide any essential, previously unknown information capable of relaunching or contributing to the debate on tax evasion (see paragraphs 28 to 34 above).

106. In taking that approach, the Court of Appeal gave a detailed explanation for its reasoning as to the fifth criterion established by the *Guja* case-law. Accordingly, the Court would require strong reasons to substitute its own view for that of the domestic courts (see *Von Hannover (no. 2)*, cited above, § 107). However, that situation did not apply in the present case, for the following reasons.

107. The Court of Appeal carefully assessed the interest of the applicant's disclosures, carrying out a thorough examination of their content and their repercussions for the issue of multinational companies' tax practices.

108. In this context, it acknowledged that the disclosures were of general interest (see paragraph

21 above). It even took into consideration the impact of the information, accepting that it was liable to “concern and shock people” (see paragraph 34 above).

109. Nonetheless, it held that the interest of the applicant’s disclosures weighed less heavily than the harm suffered by PwC, after finding that those disclosures were of limited relevance. In reaching that conclusion it noted that the documents did not provide any information that was essential, new or previously unknown. The Court cannot subscribe to the applicant’s view that, in so doing, the Court of Appeal added new criteria to those established by the Court’s case-law. On the contrary, it considers that the three qualifying criteria – information that is “essential, new and previously unknown” – are absorbed in the Court of Appeal’s exhaustive reasoning on the fifth criterion, concerning the balancing of the private and public interests at stake. In the Court’s opinion, these terms should be considered 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, to found the conclusion that the applicant’s disclosures lacked sufficient interest to counterbalance the harm suffered by PwC.

110. The Court considers that the Court of Appeal confined itself to examining the evidence carefully, in the light of the criteria established by the Court’s case-law in this area, before concluding that the documents disclosed by the applicant were not of sufficient interest to justify acquitting him. Moreover, the fact that, in contrast, A.D. was acquitted in application of the same criteria in the Court’s case-law confirms that the national authorities carried out a detailed examination in weighing up the respective interests.

- As regards the sixth criterion

111. In assessing the proportionality of an interference with freedom of expression, the Court has held that the nature and severity of the penalties imposed are factors to be taken into account (see *Otegi Mondragon v. Spain*, no. 2034/07, § 58, ECHR 2011). In the present case, the Court notes that the domestic courts took into consideration, as a mitigating circumstance, the “disinterested nature of the applicant’s actions” and therefore imposed only a relatively modest fine (see paragraph

35 above). The Court concludes that such a penalty can reasonably be regarded as a relatively mild one, which does not have a genuinely chilling effect on the exercise of the applicant’s freedom or that of other employees, but encourages those concerned to reflect on the legitimacy of the action being envisaged.

(c) Conclusion

112. Regard being had to the Contracting States' margin of appreciation in this sphere, the Court concludes that the domestic courts struck a fair balance in the present case 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.

113. Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaint concerning Article 10 of the Convention admissible;
2. *Holds*, by five votes to two, that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 11 May 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Milan Blaško
Registrar

Paul Lemmens
President

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

P.L.
M.B.

JOINT DISSENTING OPINION OF JUDGES LEMMENS
AND PAVLI

1. We regret that we cannot agree with the majority’s finding that there has been no violation of the applicant’s Article 10 rights in this case. Our disagreement relates both to the general approach adopted by the majority in weighing the private employer’s rights *vis-à-vis* the public interest in the disclosure of the relevant material, and to the reasons provided by the national courts in concluding that the employer’s interests ought to prevail under the circumstances. In particular, we are of the opinion that the considerations relied upon by the national courts in their assessment of what is called the “fifth criterion” identified in *Guja v. Moldova* ([GC], no. [14277/04](#), ECHR 2008), namely the criterion requiring a balancing of the public interest in obtaining the information and the harm caused by the disclosure to the employer (see *Guja*, cited above, §§ 76 and 90-91; see also paragraphs 25-34 of the present judgment), are at odds with basic notions of public-policy discourse in a democratic society. Regretfully, therefore, we are unable to agree with the majority’s acceptance of that reasoning (see paragraphs 94-110).

2. The outcome of the balancing exercise performed by the national courts was based on the supposedly limited contribution of the applicant’s disclosures to public debate, as compared in particular with the initial set of revelations, made by another employee of the company concerned. The key argument in this respect was that the documents disclosed by the applicant did not bring to light any “essential, new and previously unknown information” (see paragraph 28 of the present judgment). Based on that assessment, the national courts held that the harm suffered by the applicant’s employer outweighed the general interest in receiving the disclosed information (*ibid.*).

The nature of the applicant’s disclosures

3. We recall that the applicant’s disclosures consisted of sixteen documents, including fourteen tax returns by multinational corporations and two cover letters, some of which were used to prepare an episode of the investigative television programme “*Cash Investigation*”, broadcast on 10 June 2013 (see paragraph 8 of the present judgment). According to the investigative journalist in charge of that programme, the applicants’ revelations served as the principal basis for that episode.¹ The journalist also noted that certain disclosures made during that episode would have been impossible without access to the information revealed by the applicant.² The

¹ See <https://lequotidien.lu/politique-societe/proces-luxleaks-perrin-les-voleurs-nont-pas-ete-condamnes/>.

² *Ibid.*

documents handed over by the applicant, together with documents obtained as part of the initial disclosure by a different whistle-blower, were subsequently published on 5 and 6 November 2014 by the International Consortium of Investigative Journalists (*ibid.*). It is clear from the case file that the applicant put forward compelling arguments before the national courts (some of them mentioned in paragraph 39 of the judgment) as to why the tax returns disclosed – and in particular the annexes thereto – were important for verifying, substantiating and building upon the documents disclosed in the initial set of revelations. These arguments were also endorsed by the investigative journalist concerned, who was well placed to assess the importance of the applicant’s disclosure for the ongoing public debate on the matter. The two sets of disclosures appear therefore to have been closely connected.

4. It is not in dispute that the applicant’s disclosure was in the public interest (see paragraph 92 of the present judgment). The national courts recognised that the disclosed material facilitated a public debate in Luxembourg and, indeed, at the European level regarding the taxation of multinational companies, tax transparency, the practice of so-called “tax rulings” and fair taxation in general (see paragraph 21). For the national courts the decisive question was “*how much* was it in the public interest”? As will be explained below, we do not think that this is the correct way to pose the question under Article 10 (see, in particular, paragraph 8 below).

The weight to be attached to the interests of a private employer in whistle-blower disputes

5. It is settled case-law that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. [26682/95](#), § 61, ECHR 1999-IV, and *Guja*, cited above, § 74). Exceptions to the general principles established in Article 10 § 1 must be construed strictly, and the need for any restrictions must be established convincingly (see *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports* 1998-VI; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II; and *Guja*, cited above, § 69).

6. In determining the proportionality of an interference with the freedom of expression of an employee making a disclosure on public-interest grounds, the Court must – under the so-called “fifth *Guja* criterion” – weigh the damage, if any, suffered by his or her employer as a result of the disclosure and assess whether such damage outweighed the interest of the public in having the information revealed (see *Guja*, cited above, § 76). In contrast to the present case, the balancing exercise carried out in *Guja*, which involved disclosures made by a senior prosecutor, was between two public interests: on the one hand, the interest in informing the public about undue pressures and wrongdoing within a public prosecutor’s office and, on

the other, the interest in maintaining public confidence in that body. In *Heinisch v. Germany* (no. [28274/08](#), § 89, ECHR 2011 (extracts)), which involved a publicly-owned healthcare provider, the Court recognised that the balancing exercise can also involve the (private) interest in protecting the commercial success and viability of companies for the benefit of their shareholders and employees, but also for the wider economic good. Conversely, the Court highlighted the public interest in running public companies that meet proper service standards as an argument in favour of the disclosures.

7. The “fifth *Guja* criterion” must be interpreted and applied in line with the overarching principles referred to in paragraph 5 above. As the Court has noted specifically in connection with the application of that criterion, open discussion of topics of public concern is essential to democracy, and regard must be had to the great importance of not discouraging members of the public from voicing their opinions on such matters (see *Guja*, cited above, § 91).

8. In our view, it follows from these considerations that once it is established – as it has been in the present case – that the information disclosed by the employee was a matter of public interest, the disclosure in question must be presumed to be protected under Article 10 of the Convention. For this presumption to be rebutted under the “fifth *Guja* criterion”, the employer (and, in criminal proceedings, the prosecution) should be required to present compelling reasons, based on concrete and significant harm to the private interests concerned, for establishing that these interests clearly outweighed the value of disclosure. A less protective approach would result in considerable legal uncertainty and be likely to deter any future employees from making such disclosures, which would be at odds with the fundamental principles guiding the application of the *Guja* criteria.

9. Furthermore, the weighing of the competing interests under the “fifth *Guja* criterion” should not be made in isolation, but in the light of the global Article-10 analysis, encompassing all the relevant criteria. In other words, the *Guja* criteria are not to be viewed as mere boxes to be checked, but as principles guiding a comprehensive review by the national courts. Conversely, this does not mean that unmeritorious disclosures, made with little concern for the public interest and/or causing considerable harm to legitimate private interests, should prevail.

10. The proposed approach is also supported by recent international developments regarding the protection of whistle-blowers, which have recognised the need for strengthened protection in both the public and private spheres (see paragraphs 50-58 of the judgment). Notably, EU Directive 2019/1937 on the protection of persons who report breaches of Union law (see paragraph 51 of the judgment) does not make the protection of whistle-blowers conditional on any considerations related to the harm

caused to the employer, as long as the general conditions for protection under Article 6 of the Directive are met.

11. In the light of the above factors, we consider that the Court should have looked more closely at the manner in which the national courts weighed up the competing interests at issue in the present case. In particular, the considerations stemming from the *Guja* and *Heinisch* line of case-law have been applied in the present case – the first whistle-blower case, to our knowledge, to involve a purely private employer – without due regard for the fundamental principles of Article 10. In particular, the national decisions were based on the isolated finding of a failure to meet the “fifth criterion”, without assessing the role of that factor in the global analysis and without identifying any compelling private interests against a disclosure deemed to be generally in the public interest.

The requirement of “essential, new and previously unknown information”

12. Finally and most importantly, we take issue with the national courts’ reliance, within their assessment of the “fifth *Guja* criterion”, on the purported lack of “essential, new and previously unknown information” in the applicant’s disclosures (see paragraph 2 above). In our view, such an approach does not find support in this Court’s case-law (see paragraph 13 below), rests on a misguided notion of how public debate works (see paragraph 14 below), is likely to produce significant chilling effects (see paragraph 15 below), and is questionable on the facts of the case (see paragraph 16 below).

13. The national courts’ treatment of the applicant’s follow-up disclosure does not sit well with the Court’s general (and one might add, commonsensical) view that the fact that a public debate on a certain matter is ongoing speaks in favour of further disclosures of information which develop that debate (see, for example, *Dammann v. Switzerland*, no. [77551/01](#), § 54, 25 April 2006, and *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal*, nos. [11182/03](#) and [11319/03](#), § 27, 26 April 2007).

14. Furthermore, the distinction made by the national courts between the first and second set of revelations seems to rest on the notion that once a public debate is opened by certain information being disclosed, the public interest in receiving information that confirms, complements or reinforces the initial information is significantly reduced. Even if we were to accept the view that the facts disclosed by the current applicant were qualitatively less “novel” – general tax avoidance by corporations rather than government malfeasance as such – we find it hard to come to terms with a view of public debate that is instantaneous or frozen in time. The public’s attitudes towards issues of public interest can change constantly; in some cases, decades of

argument and counter-argument may be needed before any meaningful change in public or private conduct is achieved. In addition, with regard to the subject-matter of the revelations made by the applicant in the present case, the intricacies of corporate tax policies are hardly the most accessible topic for the general public. The national courts appear to have underestimated the great *illustrative* strength that lies in disclosures of the kind made by the applicant: yes, the general contours of a (perceived) problem may be widely known - but there is still great value in sketching out its precise dimensions and manifestations. One may be well aware, for example, of the problem of police violence; but the impact of a specific episode of excessive force captured on video can nevertheless be transformational.

15. The approach taken by the national courts, and endorsed by the majority, is capable of creating significant chilling effects for future whistle-blower disclosures in the private sector. This is because an individual who is considering disclosing information that he or she believes to be in the public interest may face great uncertainty in assessing whether that information will be deemed to meet the much higher standard of “essential, new and previously unknown” data. In this respect, it is generally recognised that “the scope of protected disclosures should be easily understandable by potential whistle-blowers”³ and that the protection of whistle-blowers should not be “subject to subjective and unpredictable conditions ... without any clear and precise indication of what is expected of the potential whistle-blower”.⁴ The approach taken by the national courts is at odds with these requirements.

16. Finally, the harm caused to the employer’s interests in the present case was negligible in the long term, as expressly recognised by the majority (see paragraph 102 of the judgment). As such, the applicant’s disclosures must have been considered of such low Article 10 value that they had to give way even to less than significant harm on the other side of the scales. While we appreciate the need for some deterrence against potentially unjustified and repeated disclosures about the Luxembourg financial market, we find that the factual assessment made by the national courts in this case is far from convincing (see paragraph 3 above).

17. In conclusion, the balance struck by the majority between the public interest in whistle-blower disclosures and the private-sector interests in secrecy is in tension with the *Guja* line of this Court’s case-law, as well as with emerging European standards in this area. In our humble view, it creates obstacles to effective protection for whistleblowing in the private sector.

³ Report of the U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 8 September 2015, A/70/361, at paragraph 33.

⁴ Resolution 2300 (2019) of the Parliamentary Assembly of the Council of Europe, at paragraph 12.7.