NJ 2024/108

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
14 februari 2023, nr. 21884/18
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Art. 10 EVRM

NJB 2023/1090
H&I 2023/92
V-N Vandaag 2023/594
V-N 2023/14.24
ECLI:CE:ECHR:2023:0214JUD002188418

Vrijheid van meningsuiting. Luxleaks. Aanscherping en verfijning *Guja*-criteria voor klokkenluiders. Schending art. 10 EVRM.

Klager, een Fransman, was in dienst van PricewaterhouseCoopers (PwC) in Luxemburg en was daar onder andere belast met het voorbereiden van aanvragen voor belastingteruggave voor cliënten. In 2010 heeft hij ontslag genomen. Voor zijn vertrek heeft hij vertrouwelijke documenten gekopieerd, waaronder belastingaangiften en overeenkomsten met de belastingdienst. In 2011 heeft hij deze documenten aan een journalist verstrekt. Vervolgens hebben verschillende (online)media aandacht besteed aan de zeer gunstige belastingafspraken (Advance Tax Agreements, ook wel tax rulings) die het kantoor voor grote multinationals wist te maken met de Luxemburgse belastingdienst, later bekend als 'Luxleaks'. De journalist en klager zijn hiervoor strafrechtelijk vervolgd. De journalist werd vrijgesproken, maar klager werd in hoger beroep wegens onder meer diefstal en schending van het beroepsgeheim veroordeeld tot een geldboete van € 1000 en een symbolische schadevergoeding van € 1 aan PwC.

Klager heeft op 7 mei 2018 een klacht ingediend bij het EHRM, stellende dat met de veroordeling zijn recht op vrijheid van meningsuiting was geschonden. De Kamer oordeelde op 11 mei 2021 dat geen sprake was van schending van art. 10 EVRM. De zaak is vervolgens op zijn verzoek verwezen naar de Grote Kamer van het Europees Hof.

ERHM (Grote Kamer): Niet in geschil is dat de strafrechtelijke veroordeling van klager een inbreuk op zijn vrijheid van meningsuiting was in de zin van art. 10 lid 1 EVRM en dat deze inbreuk bij de wet was voorzien en een legitiem doel nastreeft, te weten de bescherming van reputatie of de rechten van anderen, in dit geval het accountantskantoor. De vraag ligt voor of deze inbreuk al dan niet noodzakelijk was in een democratische samenleving (art. 10 lid 2 EVRM). De uitingsvrijheid op de werkvloer wordt volgens de Grote Kamer consistent beschermd in zijn rechtspraak. Daarbij heeft zich geleidelijk aan rechtspraak over klokkenluiders ontwikkeld, waarbij met name de Guja-criteria van belang zijn (EHRM 12 februari 2008, NJ 2008/305, m.nt. E.A. Alkema):
(i) Zijn alternatieve kanalen beschikbaar voor de openbaarmaking?
(ii) Is de geopenbaarde informatie authentiek?
(iii) Handelde de klokkenluider te goeder trouw?
(iv) Wat is het publieke belang bij de geopenbaarde informatie?
(v) Welk nadeel levert openbaarmaking op voor de werkgever, en hoe verhouden het publieke belang en het nadeel zich tot elkaar?
(vi) Wat is de zwaarte van de opgelegde sanctie?
Sinds Guja hebben zich verschillende ontwikkelingen voorgedaan. Het Hof ziet de voorliggende zaak dan ook als een gelegenheid om niet alleen de bestaande criteria te herbevestigen en te consolideren, maar ook om ze te verfijnen in het licht van de veranderde context.
(ad i): De Grote Kamer overweegt dat het benutten van interne, hiërarchische kanalen de voorkeur heeft, maar onder bepaalde omstandigheden kan het aangewezen zijn om direct naar buiten te treden. De omstandigheden van het geval bepalen wat het voorkeurskanaal zou moeten zijn. In deze zaak waren er geen alternatieve kanalen voor de openbaarmaking. De vertrouwelijke documenten behoorden tot de normale, legale praktijkvoering van PwC, zodat het gebruik van een intern kanaal om ze te openbaren geen effectieve manier was geweest om de klok te luiden. Indien nodig de media opzoeken is dan acceptabel.
(ad ii en iii): Van een klokkenluider kan niet altijd worden gevergd dat deze alle informatie checkt. Wel is een voldoende mate van zorgvuldigheid van belang; klokkenluiders moeten zich verantwoordelijk gedragen. In deze zaak staat vast dat de vertrouwelijke documenten accuraat en betrouwbaar waren en dat de klokkenluider te goeder trouw was, te weten dat hij voldoende mate van zorgvuldigheid heeft betracht en een motief had dat ziet op het belang van de onderneming of het algemeen belang.
(ad iv): Het delen van informatie moet in het algemeen belang zijn. Het gaat er vooral om of het algemene publiek een legitiem belang zou kunnen hebben bij het hebben van bepaalde informatie om een oordeel te kunnen vormen over de vraag of sprake is van een aantasting van een algemeen belang. Hoewel algemeen belang vooral in verband wordt gebracht met overheidsorganen, kunnen vergelijkbare criteria ook voor de private sector gelden. Ook ondernemingen hebben een zekere verantwoordingsplicht. De belastingaangiften die onderwerp waren van deze zaak zouden nieuwe inzichten kunnen geven in een lopend debat over belastingontwijking en -ontduiking door grote multinationals. De Grote Kamer acht de informatie die werd gedeeld daarmee duidelijk van algemeen belang.
(ad v): Het belang bij het delen van informatie moet zwaarder wegen dan het nadeel dat aan de werkgever en anderen wordt toegebracht. Ook private partijen kunnen nadeel lijden, zoals financiële schade of reputatieschade. Er moet niet alleen naar de directe, maar ook naar de bredere maatschappelijke en economi-

sche gevolgen worden gekeken, zoals het belang dat medewerkers zich aan hun geheimhoudingsplicht houden.
(ad vi): Hoe zwaarder de sancties, hoe groter het risico van een 'chilling effect' op potentiële klokkenluiders. Met name strafrechtelijke vervolging heeft veel gevolgen, ook als uiteindelijk geen hoge straf wordt opgelegd.
Het Hof oordeelt dat in deze zaak dat het publieke belang zwaarder weegt dan het nadeel. De nationale rechter had het betrokken algemene belang te restrictief geïnterpreteerd en te zwaar gewicht toegekend aan het imagobelang van PwC. Ook moet de ernst van de sanctie niet onderschat worden. Weliswaar kan een boete van € 1.000 worden gezien als een relatief milde straf, maar van een strafrechtelijke veroordeling kan in de toekomst wel een 'chilling effect' uitgaan in de richting van anderen die overwegen voor het publiek belangrijke informatie te openbaren. De sanctie stond daarom niet in een redelijke verhouding tot het daarmee beoogde doel. Dit alles leidt tot de conclusie dat de inbreuk op klagers recht op vrijheid van meningsuiting niet noodzakelijk was in een democratische samenleving en dat sprake is van schending van art. 10 EVRM.

Halet
tegen
Luxemburg

EHRM (Grote Kamer):

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; (*NJ* 2008/305, m.nt. E.A. Alkema; *red.*)), 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); (*NJ* 2012/282, m.nt. E.J. Dommering; *red.*), 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... '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 (...; hereafter, 'Resolution no. 1729(2010)'; in the Recommendation of the Committee of Ministers of the Council of Europe of 30 April 2014 (...; 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 (...; 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 under-

mine 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 (...).

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,...) 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 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.

1 Committing to Effective Whistleblower Protection, 16 March 2016.

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;...), 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 (...). 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 (...), 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' (...) 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 (...), 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' (...). 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 (...), 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 consider-

able 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 (...). 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,...) 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 (...) and of the Court of Appeal's judgment (...), 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* cri-

teria', 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 (...), 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' (...).

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' (...) and concern a public interest without 'the act, omission, practice, conduct or shortcoming necessarily constituting a criminal offence' (...).

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 (...), 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. (...)), 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 (...) — prepared by the applicant's employer for the Luxembourg tax authorities on be-

half 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' (...). 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 (...). 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' (...) and it accepted that the criterion of good faith had been met (...). 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 re-

lied in turn on the documents disclosed by A.D., who has been granted whistle-blower status, and the applicant (...).

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 (...).

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' (...). 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 (...), 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' (...). 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 (...).

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' (...), 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 (...) 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 (...). 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 (...) 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' (...). 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 (...).

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 (...) 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 (...). 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 (...).

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' (...).

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' (...), 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 (...). 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 (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 € 15,000.

(...)

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) € 15,000 (fifteen thousand euros), plus any tax that may be chargeable to him, in respect of non-pecuniary damage;

(ii) € 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.

Noot

De zaak

1. Rafaël Halet (H), een Fransman, werkzaam in Luxemburg, had in 2012 als 'klokkenluider' 12 documenten aan de pers doorgespeeld en was daarvoor door de hoogste Luxemburgse rechter veroordeeld wegens schending van zijn geheimhoudingsplicht. H. was op het moment van de schending van het geheim in dienst van PricewaterhouseCoopers (PwC). De geheime documenten betroffen individuele belastingafspraken van vermogende mensen en ondernemingen (zogenaamde Advance Tax Agreements, ook wel tax rulings of fiscale rescripten genaamd, in het arrest aangeduid als 'ATAs'). De stukken kwamen terecht bij een groep journalisten die zichzelf aanduidden als een 'International Consortium of Investigative Journalists ('ICIJ'). Hun publicatie op basis van de gelekte documenten is bekend als de 'Luxleaks'. Deze publicatie had een behoorlijke impact op het beleid van de Europese Commissie. Het leidde tot de uitvaardiging van nieuwe transparantiemaatregelen en, in 2015, een voorstel tot aanpassing van de EU-richtlijn over dit onderwerp. Binnen PwC was H. als de dader van het doorspelen van (een deel) van de documenten geïdentificeerd. Er volgde een strafrechtelijke procedure tegen hem, de accountant A.D. die ook documenten had gelekt en de betrokken journalist (E.P.). H. voerde aan dat hij de bescherming van een klokkenluider behoorde te krijgen en daarom moest worden vrijgesproken (*acquitté*). Hij beriep zich daarbij op artikel 10 EVRM, in het bijzonder op het arrest *Guja v. Moldova* [GC], *NJ* 2008/305, m.nt. E.A. Alkema.

2. In maart 2025 deed de EU Commissie een voorstel tot aanpassing van de richtlijn over de verplichte uitlevering van informatie op het gebied van de belastingen, later in dat jaar gevolgd door een voorstel tot aanpassing van Richtlijnen 2015/2376/EU en 2011/16/EU, met name door in het verplichte informatiepakket over het beleid van de belastingauto-

riteiten de 'rulings' in individuele gevallen op te nemen. Op grond van deze bevindingen oordeelde de rechter in hoger beroep dat de gelekte informatie ging over een kwestie van groot publiek belang. De door de Grand Chamber ontwikkelde criteria voor geoorloofd handelen van klokkenluiders toepassend (r.o. 31-39), oordeelde het hof dat H. niet helemaal was vrij te pleiten maar verzachtende omstandigheden in acht moesten worden genomen. Dit oordeel werd door de cassatierechter bevestigd. Ook de beslissingen tegen A.D. en E.P. bleven in stand. H. gaat met de zaak naar Straatsburg.

De procedure in Straatsburg

3. In het in B. geschetste internationale juridische kader stelt het Hof voorop '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' en de resolutie van de Raad van Europa van 29 april 2010 (1792-2010) ter bescherming van klokkenluiders, die worden gedefinieerd als "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". De essentiële rol van klokkenluiders werd bevestigd op 1 oktober 2019 door de Raad in Resolution 2300(2019) on "Improving the protection of whistle-blowers all over Europe".

Opnieuw zien we de impact van het EU recht, want het Hof wijdt een speciaal hoofdstukje aan Richtlijn (EU) 2019/1937 van het Europees Parlement en de Raad van 23 oktober 2019 inzake de bescherming van personen die inbreuken op het Unierecht melden. Het vindt het nodig de integrale tekst van deze richtlijn in par. 3 van hoofdstuk B over het relevante Europese recht op te nemen.

4. Bij de beoordeling van de zaak draait het in de eerste plaats om het precedent in de jurisprudentie van het Hof. De zaak *Guja* (*Guja v. Moldova* [GC], *NJ* 2008/305, m.nt. E.A. Alkema, §§ 74-95 waarin het Hof de criteria voor beschermd klokkenluiderschap heeft ontwikkeld, in het arrest ook aangeduid als de '*Guja* criteria', over de toepassing waarvan tussen partijen discussie was. Ik citeer r.o. 60:

> *"It then sought to establish whether the national courts had complied with the various criteria developed in the Guja judgment, 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."*

5. Dit is voor de Grand Chamber in de principieel opgezette zaak (waarin ook journalistieke belangenorganisaties intervenieerden, zie r.o. 97-107) aanleiding deze criteria nog eens tegen het licht te houden (r.o. 114 e.v.). Het Hof relativeert eerst de criteria die zijn ontleend aan de loyaliteit die de werknemer-klokkenluider verschuldigd is jegens zijn werkgever (de zaak *Heinisch*, EHRM 21 juli 2011, *NJ* 2012/282, m.nt. E.J. Dommering). Als er geen arbeidsverhouding tussen de klokkenluider en de organisatie waarover hij informatie 'lekt' bestaat, valt het loyaliteitscriterium af. R.o. 117:

> *"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."*

Bovendien beperkt het Hof in de volgende twee r.o. het begrip 'klokkenluiden' en de daaraan verbonden beperkingen tot het naar buiten brengen van *geheime* informatie en de *feitelijke* vertrouwensrelatie zoals deze uit de concrete arbeidsverhouding voortvloeit. Na deze beperking van het begrip 'klokkenluiden', loopt het in de r.o. 120 e.v. de '*Guja* criteria' door in het licht van de inmiddels gegroeide opvattingen in de maatschappelijke praktijk.

6. Het Hof handhaaft het criterium dat een ('echte') klokkenluider eerst moet zoeken naar een interne oplossing, maar dat de bestaande interne kanalen kunnen worden gepasseerd als deze ineffectief of onbetrouwbaar zijn gebleken. Het relativeert het criterium van de betrouwbaarheid en authenticiteit van de gelekte informatie, omdat de klokkenluider niet in de positie is om het 'volledige plaatje' te krijgen. Hij heeft een inspanningsverplichting om een zo volledig mogelijk beeld te krijgen ('must have carefully verified that the information was accurate and reliable'). Het criterium dat de klokkenluider te goeder trouw moet zijn (niet uit moet zijn op persoonlijk voordeel of wraak) blijft staan. Hetzelfde geldt voor de eis dat er een 'werkelijk' algemeen belang in het spel moet zijn, en rechters die met een dergelijke zaak geconfronteerd worden dat ook zorgvuldig dienen vast te stellen (r.o. 113-144). Nieuwsgierigheid van het publiek is onvoldoende. Een ander belangrijk criterium dat blijft staan is de afweging van de schade die aan de werkgever door de 'onthulling' wordt toegebracht en de zwaarte van het algemeen belang dat met de publicatie van de informatie wordt gediend. Tot slot staat het Hof lang stil bij het laatste criterium, de zwaarte van de sanctie die aan de klokkenluider wordt opgelegd. Daarbij is het vooral kritisch over het opleggen van een strafsanctie.

7. Afweging van deze criteria in de onderhavige zaak heeft tot gevolg dat de Luxemburgse beslissing sneuvelt, omdat het EHRM vindt dat de (in de beslissing in deze zaak door het Hof verfijnde) criteria door de Luxemburgse rechters niet correct zijn toegepast. Reden waarom het Hof die afweging zelf nog een keer doet (r.o. 178). Het vindt (r.o. 183) het toegepaste criterium dat de onthulde informatie 'essential, new and previously unknown' is, te zwaar. Het vindt in r.o. 184 voldoende *"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."* Dit kleurt ook zijn beoordeling in r.o. 189 van de relevantie en het gewicht van de informatie die door H. naar buiten is gebracht en die de Luxemburgse rechters als uitsluitend 'scandaleus' hadden gekarakteriseerd. Deze informatie *"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' 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 and, in particular, in France."* In dezelfde lijn is de kritiek die het EHRM heeft op de beoordeling door de Luxemburgse rechters van de onaanvaardbaarheid van de schade die PwC door de publicatie zou hebben geleden (r.o. 193-200): die moet als groot internationaal opererend belastingadvieskantoor tegen een stootje kunnen.

8. Dit leidt dan tot een nieuwe integrale afweging door het Hof die in r.o. 202 in het nadeel van de Luxemburgse rechters uitvalt. Ook de opgelegde sanctie is te zwaar. R.o. 202:

> *"In this connection, it reiterates that it has acknowledged that the information disclosed by the applicant was undeniably of public interest. 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 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."*

9. Dit is dus een 'afweging van belangen' beslissing zoals ook wel blijkt uit de dissenting opinions. Het is daarom moeilijk er algemene conclusies uit te trekken. Wel lijkt het erop dat wanneer er een 'aanzwellend' publiek debat is over een bepaalde kwestie de 'onthullingsruimte' daarover groter wordt.

E.J. Dommering

NJ 2024/109

HOF VAN JUSTITIE VAN DE EUROPESE UNIE
18 januari 2022, nr. C-261/20
(K. Lenaerts, L. Bay Larsen, A. Arabadjiev, A. Prechal, K. Jürimäe, C. Lycourgos, E. Regan, S. Rodin, I. Ziemele, J. Passer, M. Ilešič, F. Biltgen, P.G. Xuereb, N. Piçarra, L.S. Rossi; A-G M. Szpunar)
m.nt. A.W.H. Meij*

Art. 15 lid 1, lid 2 onder g), lid 3 Richtlijn 2006/123

O&A 2022/22
RvdW 2022/752
ECLI:EU:C:2022:33
ECLI:EU:C:2021:620

Verzoek om een prejudiciële beslissing ingediend door het Bundesgerichtshof (hoogste federale rechter in burgerlijke en strafzaken, Duitsland) bij beslissing van 14 mei 2020.

Vrij verrichten van diensten. Honoraria van architecten en ingenieurs. Verplichte minimumtarieven. Rechtstreekse werking. In de loop van een procedure voor een nationale rechterlijke instantie gewezen niet-nakomingsarrest.

Het Unierecht moet aldus worden uitgelegd dat een nationale rechter bij wie een geding tussen uitsluitend particulieren aanhangig is gemaakt, louter op grond van dat recht niet verplicht is om een nationale regeling buiten toepassing te laten waarbij, in strijd met artikel 15 lid 1, artikel 15 lid 2 onder g) en artikel 15 lid 3 van Richtlijn 2006/123/EG van het Europees Parlement en de Raad van 12 december 2006 betreffende diensten op de interne markt, minimumhonoraria voor de diensten van architecten en ingenieurs worden vastgesteld en overeenkomsten die van deze regeling afwijken nietig worden verklaard, onverminderd, ten eerste, de mogelijkheid van deze rechter om in het kader van een dergelijk geding deze regeling buiten toepassing te laten op basis van het nationale recht en, ten tweede, het recht van de partij die is benadeeld doordat het nationale recht niet in overeenstemming is met het recht van de Unie, om vergoeding te vorderen van de schade die zij dientengevolge heeft geleden.

Thelen Technopark Berlin GmbH
tegen
MN

* Mr. A.W.H. Meij is oud-rechter, o.m. in het Gerecht van de EU.