

BETWEEN:

HALET

Applicant

v

LUXEMBOURG

Respondent

WRITTEN COMMENTS OF THE THIRD-PARTY INTERVENER

Introduction

1. These written comments are submitted by Media Defence, hereafter ‘the Intervener’, pursuant to leave granted by the President of the Grand Chamber in accordance with Rule 44 of the Rules of Court.
2. This case concerns the criminal conviction of the applicant, an employee of a multinational company, following the disclosure of sixteen company documents to an investigative journalist. The documents were used in a television program about multinational companies and the payment of tax. They were also published online by the International Consortium of Investigative Journalists. In the domestic proceedings, and before a Chamber of the Third Section of the Court, there was no dispute as to the public interest in the documents or that they had contributed to public debate on the issues of transparency and fairness in the tax system, nationally and internationally. Notwithstanding this, the Chamber found no violation of article 10. It held that the domestic courts had carried out an appropriate balancing exercise between harm to the company and the applicant’s right to freedom of expression. In particular, it endorsed the approach of the domestic court, that the finding that the documents did not contain information that was “essential, new and unknown”, was a legitimate consideration in its analysis of those competing rights.
3. The issues to be determined in this case are likely to have a significant impact on how investigative journalism is conducted, including with respect to newsgathering and reportage. Journalistic sources are coming under increasing pressure throughout the territory of the Council of Europe, through sophisticated surveillance techniques, seizure of equipment during raids on homes and media houses, and threats and intimidation.¹ This is the case even though states are required to create a favourable environment for public debate and for the expression of opinions and ideas without fear.² Whistleblowers play an important role as a journalistic source, disclosing important information on a range of matters relating to the public interest. Any measure that reduces the level of protection available to whistleblowers by extension impacts on the ability of the press to do its job.
4. These written comments seek to assist the Court in its determination of the issues raised in this case by providing an analysis of international and comparative law addressing the

¹ Council of Europe, *Hands Off Press Freedom: Attacks on Media in Europe Must Not Become a New Normal*, Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists, (March 2020), available at: <https://rm.coe.int/annual-report-en-final-23-april-2020/16809e39dd>

² ECtHR, *Dink v Turkey*, nos. 2668/07 and 4 others, 14 September 2010, §137; See also, Committee of Ministers, *Recommendation CM/Rec (2016) 4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors* (13 April 2016), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1, §2: “Member States should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear”; Parliamentary Assembly of the Council of Europe, *Resolutions 2137(2020) Threats to media freedom and journalists’ security in Europe* (28 January 2020), available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28508&lang=en> §6: “The Assembly calls on member States to create an enabling and favourable media environment and review to this end their legislation, seeking to prevent any misuse of different laws or provisions which may impact on media freedom—such as those on defamation, anti-terrorism, national security, public order, hate speech, blasphemy or memory laws—which are too often applied to intimidate and silence journalists”.

following considerations: (1) The essential role of whistleblowing for effective newsgathering and reportage on public interest matters; (2) The emerging legislative consensus, in Europe and elsewhere, of the importance of ensuring whistleblower protection, having regard to reporting on matters of public interest; (3) Relevant factors to be taken into account when considering whistleblowing in the context of private enterprise.

The essential role of whistleblowing for effective newsgathering and reportage on public interest matters

5. The justification for free speech most often associated with freedom of the press is the ‘argument from democracy’.³ The emphasis is on the public’s interest in receiving information to facilitate participation in informed debate and deliberation.⁴ The availability through the media of a range of information on matters of public concern and controversy allows for informed public opinion to emerge. For that information to be available the press must be able to access it.⁵
6. On matters of public concern, where information is purposely concealed or obscured, often the only way in which it can become public knowledge is through a whistleblower. To ensure such information is publicly disclosed whistleblowers often rely on the support of journalists to disseminate that information. The relationship between journalists and their sources, including whistleblowers, begins at the newsgathering phase. Newsgathering is protected by article 10 and this Court has recognised that “the gathering of information ... is an essential preparatory step in journalism and is an inherent, protected part of press freedom”,⁶ while noting the resulting chilling effect that can be caused by obstacles that are created to hinder certain methods used to gather information.⁷ In its case law, the Court has protected different forms of preparatory newsgathering activity, including communications with confidential sources,⁸ access to certain types of information⁹, and interviews with third parties.¹⁰

³ Eric Barendt, *Freedom of Speech* (2nd edition), Oxford University Press 2007

⁴ Related to this, according to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression the right to information is grounded in the public’s right to know “information of public interest” see UN General Assembly, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc No. A/68/362 (4 September 2013), available at: <https://undocs.org/A/68/362>, §19; see also the Inter-American Court, in the Advisory Opinion concerning *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, (Ser. A) No 5 (1985), [70]: ‘[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion ... It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.’

⁵ In the UK House of Lords case *R v Shayler*, Lord Bingham noted “the role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one ... but the press cannot expose that of which it is denied knowledge”. See *R v Shayler*, UKHL 11, §21, 21 March 2002

⁶ ECtHR, *Társaság a Szabadságjogokért v Hungary*, no. 37374/05, §27, 14 April 2009

⁷ *Id.*, §38.

⁸ ECtHR, *Goodwin v the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II

⁹ ECtHR, *Youth Initiative for Human Rights v Serbia*, no. 48135/06, 25 June 2013

¹⁰ See ECtHR, *Jersild v Denmark*, 23 September 1994, §35, Series A no. 298, in which the Court observed that the preparatory step of conducting interviews is “one of the most important means whereby the press is able to play its vital role of ‘public watchdog’.”

7. Connected to this is the recognition that the case law of this Court confers upon journalists “certain increased protections under Article 10 of the Convention”.¹¹ The rationale behind this was explained by Laws LJ in a case before the High Court of England and Wales involving the seizure of material obtained by Edward Snowden from the partner of a prominent journalist, where he noted: “... an important difference between the general justification of free expression and the particular justification of its sub-class, journalistic expression. The former is a right which belongs to every individual for his own sake. But the latter is given to serve the public at large ... The journalist enjoys no heightened protection for his own sake, but only for the sake of his readers or his audience.”¹²
8. The emphasis therefore is on the benefit that accrues to the reader or audience, as opposed to the rights of the ‘speaker’. Seen in this light, the critical importance of whistleblowing to newsgathering, especially in the context of investigative journalism, is evident.¹³ The Organisation for Economic Cooperation and Development (the OECD), in a recent report, noted that, “Whistleblower protection is the ultimate line of defence for safeguarding the public interest.”¹⁴
9. In recent years important stories involving corruption and malfeasance have only come to light because of whistleblowers. Relying on the disclosure of information by whistleblowers, investigative journalists have reported on the harmful societal impact of decisions taken by Facebook¹⁵; the problems in manufacturing at Boeing in the wake of two airplane crashes¹⁶; and the extensive corruption at a prominent healthcare start-up¹⁷. In

¹¹ Committee of Ministers of the Council of Europe, *Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors*, (adopted on 30 April 2014 at the 1198th meeting), available at:

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5e9d, §6; See also ECtHR, *Stoll v Switzerland* [GC], no. 69698/01, §102, ECHR 2007-V; ECtHR, *Thoma v Luxembourg*, no. 38432/97, §48, ECHR 2001-III

¹² England and Wales High Court, *David Miranda v Secretary of State and Another*, [2014] EWHC 255 (Admin), §46

¹³The European Parliament and the Council of the European Union, *Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law*, (23 October 2019), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937>, §46: “Whistleblowers are, in particular, important sources for investigative journalists. Providing effective protection to whistleblowers from retaliation increases legal certainty for potential whistleblowers and thereby encourages whistleblowing also through the media. In this respect, protection of whistleblowers as journalistic sources is crucial for safeguarding the ‘watchdog’ role of investigative journalism in democratic societies.”

¹⁴OECD, *Committing to Effective Whistleblower Protection*, (16 March 2016), available at: https://read.oecd-ilibrary.org/governance/committing-to-effective-whistleblower-protection_9789264252639-en#page13, page 11; See also David Lewis, AJ Brown and Richard Moberly, *International Handbook on Whistleblowing Research*, Cheltenham UK 2014, page 33: “In the modern age of institutions, whistleblowing is now established as one of the most important processes – if not the single most important process - by which governments and corporations are kept accountable to the societies they are meant to serve and service”.

¹⁵ The Washington Post, *A whistleblower’s power: Key takeaways from the Facebook Papers*, (26 October 2021), available at: <https://www.washingtonpost.com/technology/2021/10/25/what-are-the-facebook-papers/>

¹⁶ The New York Times, *The Whistle-Blowers At Boeing*, (23 April 2019), available at: <https://www.nytimes.com/2019/04/23/podcasts/the-daily/boeing-dreamliner-charleston.html?showTranscript=1>

¹⁷ The Wall Street Journal, *Theranos Whistleblower Shook the Company – and His Family*, (18 November 2016), available at: <https://www.wsj.com/articles/theranos-whistleblower-shook-the-companyand-his-family-1479335963>

2016, the BBC and The Guardian, among others, published the ‘Panama Papers’ which detailed the offshore tax arrangements of leading politicians and other public figures. The documents were originally obtained by the German newspaper *Süddeutsche Zeitung* from an anonymous whistleblower and passed to the International Consortium of Investigative Journalists.¹⁸ In 2021 more than 11 million leaked documents, collectively referred to as the ‘Pandora Papers’, revealed the hidden offshore tax interests and activities of wealthy individuals from across the world. The papers identify unethical or corrupt practices of high-profile individuals from more than 90 countries. Each of these stories involved the corruption or malfeasance of private entities and their publication was undoubtedly in the public interest.

10. One aspect of newsgathering, relating to the right of access to information held by the state, can be given force through legislation, as is the case in many states within the territory of the Council of Europe. The other, more general, aspect involves the right to gather information on matters of public interest in order to pass that information on to the public. This distinction is relevant when considering the newsgathering methods available to, and deployed by, journalists in the context of disclosures relating to a private company for example.¹⁹ It also highlights the close connection between effective protection for whistleblowers and the safeguarding of public interest newsgathering. State restrictions on the ability of journalists to access certain information should be subject to close scrutiny by the Court. Authority for this proposition can be found in *Dammann v Switzerland*, where the Court called for the ‘closest scrutiny’ of state restrictions on journalists’ research and investigative activities on account of the danger to press freedom represented by such restrictions.²⁰
11. The relationship between journalists and whistleblowers extends beyond the newsgathering phase into the publication phase. This Court has, on numerous occasions, emphasised that the press “has a duty to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest”.²¹ The UN Special Rapporteur on freedom of expression and opinion, in his report to the UN Human Rights Council in 2012, noted that individuals carrying out a journalistic function “observe and describe events, document and analyse events, statements, policies, and any propositions that can affect society, with the purpose of systematizing such information and gathering of facts and analyses to inform sectors of society or society as a whole”.²²
12. Consistent with this description this Court has recognised that the techniques of reporting, including editorial decisions about content, are matters for the media and not for courts,

¹⁸ See The Guardian, *Panama Papers – A special investigation into the leaked documents created by Panamanian law firm Mossack Fonseca*, (8 April 2016), available at: <https://www.theguardian.com/news/series/panama-papers>

¹⁹ See §26 below

²⁰ ECtHR, *Dammann v Switzerland*, no. 77551/01, §52, 25 April 2006; ECtHR, *Társaság a Szabadságjogokért v Hungary*, no. 37374/05, §26, 14 April 2009: “...the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society’s “watchdogs”, in the public debate on matters of legitimate public concern, even measures which merely make access to information more cumbersome”.

²¹ ECtHR, *Bédat v Switzerland* [GC], no. 56925/08, §50, 29 March 2016.

²² United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, UN Doc. No. A/HRC/20/17, (4 June 2012), available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-17_en.pdf, §3-4.

including domestic courts, to determine.²³ In that respect, it has stated that journalists enjoy the freedom to choose which news items that come to their attention they will deal with and how they will report on them.²⁴ This approach is important in the context of the practical realities of modern day reporting and whistleblowing.²⁵ Largescale data breaches and leaks now regularly affect private organisations and institutions. That content can be detailed and relate to complex topics such as tax avoidance across multiple jurisdictions. It can be disseminated across multiple platforms – television, radio, print and online – to reach different audiences.

13. Journalists are required to make that information accessible to the public in a way that can be understood.²⁶ Where that information relates to an ongoing public debate on a matter of controversy, this Court has recognised the important contribution journalists can make to the continuation of that debate through the disclosure of further, relevant information.²⁷ In cases involving the public interest courts should be slow to apply an overly rigorous approach to how journalists report on that information. Otherwise, as this Court has noted, they could be unduly deterred from discharging their function of keeping the public informed, which would have serious implications for the media's ability to carry out its role as a 'public watchdog'.²⁸
14. Such an approach would also be likely to have a significant impact on potential whistleblowers, operating in the public and private sphere, when an individual is considering whether to disclose information they consider to be in the public interest. These concerns were recognised by the Parliamentary Assembly of the Council of Europe in its 2019 Resolution which emphasised the importance of ensuring that whistleblower protection should not be "[subject to] subjective and unpredictable conditions (...), without clear and precise indications of what is expected from the potential whistleblower".²⁹

²³ See, for instance, ECtHR, *Jersild v Denmark*, 23 September 1994, §31, Series A no. 298, "...the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists."; ECtHR, *Fressoz and Roire v France* [GC], no. 29183/95, §52, ECHR 1999-I; ECtHR, *MGN Limited v the United Kingdom*, no. 39401/04, §145, 18 January 2011

²⁴ ECtHR, *Couderc and Hachette Filipacchi Associés v France* [GC], no. 40454/07, §31 and 139, ECHR 2015 (extracts)

²⁵ For example, in relation to the Pandora Papers, the scale and complexity of information obtained by the International Consortium of Investigative Journalists, who worked with over 140 media organisations in coordinating the publication of the material

²⁶ For example, see *Fressoz and Roire v France* (2001) 31 EHRR 28 Le Canard Enchaîné published the salary of the chairman of Peugeot, (which was publicly available information) and also, by way of confirmation, photographs of the relevant part of his tax assessment, which was confidential and could not lawfully be published. The Court held that the conviction of the journalists for publishing the assessment infringed their right of free speech under article 10: "If, as the Government accepted, the information about M. Calvet's annual income was lawful and its disclosure permitted, the applicants' conviction merely for having published the documents in which the information was contained, namely the tax assessments, cannot be justified under article 10. In essence, that article leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility."

²⁷ ECtHR, *Dammann v Switzerland*, no. 77551/01, §54, 25 April 2006

²⁸ ECtHR, *Bozhkov v Bulgaria*, no. 3316/04, 19 April 2011

²⁹ Parliamentary Assembly of the Council of Europe, *Resolution 2300 (2019) Improving the protection of whistle-blowers all over Europe*, (1 October 2019), available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28150&lang=en>, §12.7

The emerging legislative consensus of the importance of ensuring whistleblower protection, having regard to reporting on matters of public interest.

15. The definition of a whistleblower varies across international treaties and domestic legislation. The UN Special Rapporteur on freedom of expression and opinion provides a principled definition, underpinned by the established objectives of whistleblowing - the right to know, accountability, and democratic governance: “a whistle-blower is a person who exposes information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety”.³⁰ There is a clear state interest in ensuring that their laws on whistleblowing encourage members of the public to reveal these threats or harms.
16. However, there is a key practical difficulty inherent in whistleblowing in the private sector that can impede that interest. The prospect of prolonged and expensive litigation brought by a powerful, well-resourced corporation can have a chilling effect on the willingness of employees to come forward. Taking this into account, the importance of ensuring potential whistleblowers can rely on clear, consistent, and accessible standards of protection in the case of disclosure of public interest information cannot be overstated. Any uncertainty as to the law is bound to have a chilling effect.
17. At the Council of Europe level, the Committee of Ministers in its 2014 Recommendation has recognised the importance of protection for both public and private sector whistleblowers who report or disclose information relating to a threat to the public interest, including to the public in the context of their work-based relationship.³¹ The 2019 Resolution urged states to “improve the protection of whistle-blowers throughout Europe”.³² Notably, in the context of protection, it endorsed the EU’s 2019 Whistleblowing Directive (the Directive), which provides for protection to any person working in the private or public sector who, having received information related to a breach of EU law in a work-related context, makes a report regarding alleged wrongdoing.³³
18. Importantly, the Resolution invites Council of Europe member states that are also members of the EU to adopt its provisions, while adding that reports of violations or abuses of their national law should be protected according to the same principles. For non-EU Council of Europe member states the Resolution invites them to adapt their legislation in this area or adopt new laws based on the EU’s approach.³⁴
19. When the draft Directive was announced in 2018, the First Vice-President of the European Commission, Frans Timmermans, stated: “if we better protect whistleblowers, we can

³⁰ United Nations General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN DOC A/70/361 (8 September 2015), available at: <https://www.undocs.org/A/70/361>, §28

³¹ Committee of Ministers of the Council of Europe, *Recommendation CM/Rec (2014)7 of the Committee of Ministers to member States on the protection of whistleblowers* (adopted on 30 April 2014 at the 1198th meeting), available at: <https://rm.coe.int/16807096c7>, §1

³² Parliamentary Assembly of the Council of Europe, *Resolution 2300 (2019) Improving the protection of whistle-blowers all over Europe*, (1 October 2019), available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28150&lang=en>

³³ *Id.*, §7 – 9.2

³⁴ *Id.*, §11

better detect and prevent harm to the public interest such as fraud, corruption, corporate tax avoidance or damage to people's health and the environment".³⁵ While the Directive only mandates 'minimum' protections for whistleblowers it expressly authorises member states to enact laws that will advance the ability of Member States to detect and prosecute corruption, protect the environment, and enhance the rule of law.³⁶ Protection is referenced extensively throughout the Directive.³⁷ Member states are encouraged to put in place robust whistleblower laws that provide adequate protection, incentivise reporting, and provide the necessary assistance to law enforcement agencies to effectively combat corruption. The Directive offers clear guidance on how states can most effectively enact laws to ensure the widest possible protection.³⁸ Importantly, in the context of disclosures made by the employee of a corporation for example, it does not make that protection conditional on factors relating to any harm such disclosures might cause to that private entity.³⁹

20. The Directive also recognises the importance of whistleblowers as sources for investigative journalists reporting on public interest matters. The preamble refers to the importance of creating legal certainty for protection of potential whistleblowers to encourage whistleblowing through the media, noting that "in this respect, protection of whistleblowers as journalistic sources is crucial for safeguarding the 'watchdog' role of investigative journalism in democratic societies".⁴⁰ The Directive goes on to provide that a whistleblower can disclose information directly to the press where this is done "pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information".⁴¹
21. The emphasis on whistleblower protections can be found in other regions. The Inter American Commission on Human Rights (the IACHR) has said that whistleblowing is a key element in the fight against corruption.⁴² The Inter-American Convention Against Corruption, provides that "the States Parties agree to consider the applicability of measures within their own institutional systems to create, maintain and strengthen ... systems for

³⁵ European Commission, *Whistleblower protection: Commission sets new, EU-wide rule* (23 April 2018), available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3441

³⁶ The European Parliament and the Council of the European Union, *Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law*, (23 October 2019), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937>

³⁷ *Id.*, See for example Article 6 - Conditions for protection of reporting persons 1. Reporting persons shall qualify for protection under this Directive provided that: (a) they had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive; and (b) they reported either internally in accordance with Article 7 or externally in accordance with Article 10 or made a public disclosure in accordance with Article 15.

³⁸ The Directive encourages states to expand protections to cover disclosures permitted under international anticorruption conventions signed by member states; interpret articles relating to measures of protection in a way that ensures whistleblowers are not chilled from making disclosures; and to utilise language that has proven effective in protecting whistleblowers.

³⁹ Connected to this point, the preamble to the Directive notes that it draws upon the case law of this Court on the right to freedom of expression, and the Council of Europe 2014 Recommendation on the Protection of Whistleblowers. See, The European Parliament and the Council of the European Union, *Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law*, (23 October 2019), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937>, §31 of the Preamble

⁴⁰ *Id.*, §46 of the Preamble

⁴¹ *Id.*, Article 15

⁴² IACHR, *Corruption and Human Rights in the Americas: Inter-American Standards*, OEA/Ser.L/V/II. Doc No. 236 (6 December 2019), available at: <https://www.oas.org/en/iachr/reports/pdfs/CorruptionHR.pdf>, §415

protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.”⁴³ The IACHR has recommended that states: “Adopt, adapt, and implement national whistleblower protection frameworks. The law should ensure that those who expose wrongdoing, gross mismanagement, human rights violations, violations of humanitarian law, or other threats to the general public interest are protected from legal, administrative, or employment-related penalties, even when their actions violate a rule or contract, so long as at the time of disclosure they had reasonable grounds to believe that the information disclosed was substantially true and exposed information about harm to public interests or potential human rights violations”.⁴⁴ The African Union Convention on Preventing and Combating Corruption 2003 includes provisions on whistleblowing, protection of witnesses and sanctions for false reporting. It states that “State Parties undertake to ... adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities ... that ensure citizens report instances of corruption without fear of consequent reprisals.”⁴⁵

22. More generally, the UN Convention Against Corruption provides for protections of witnesses and experts and their relatives from retaliation including limits on disclosure of their identities.⁴⁶ It envisions countries adopting protections for reporting of corruption by any person: “Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.”⁴⁷ The UN Special Rapporteur on freedom of expression and opinion places particular emphasis on ensuring whistleblowers are adequately protected.⁴⁸ Related to this, and consistent with the importance of ensuring a high degree of legal certainty in this context, is the recognition that “the scope of protected disclosures should be easily understandable by potential whistle-blowers”.⁴⁹
23. The international legal framework therefore requires states to take appropriate measures to provide protection for whistleblowers.⁵⁰ At the national level, protection for whistleblowers

⁴³ OAS, *Inter-American Convention Against Corruption (B-58)* adopted at the third plenary session held on 29 March 1996, Article III Preventative Measures, available at:

http://www.oas.org/en/sla/dil/inter_american_treaties_b-58_against_corruption.asp, §8

⁴⁴ IACHR, *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II Doc. 28, (30 March 2021), available at: <http://www.oas.org/en/iachr/docs/annual/2020/Chapters/rele-en.PDF>, page 440

⁴⁵ African Union, *African Union Convention on Preventing and Combating Corruption* (date of force 5 August 2006), Article 5(5) and 5(6), available at: https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf

⁴⁶ UNODC (2004), *United Nations Convention Against Corruption* (31 October 2003) Article 32, available at: https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf,

⁴⁷ *Id.*, Article 33

⁴⁸ UN General Assembly, *Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc No. A/70/361, (8 September 2015), available at: <https://www.undocs.org/A/70/361>, §26 – 57

⁴⁹ *Id.*, §33.

⁵⁰ See, UNODC, *United Nations Convention Against Corruption* (Article 33); OAS, *Inter American Convention Against Corruption* (Article 3(8)); Council of Europe, *Civil Law Convention* (Article 9); African Union, *African Union Convention on Preventing and Combating Corruption* (Article 5(6)). For similar provision, see Council of Europe, *Criminal Law Convention on Corruption* (Article 22(a)). See also, OECD,

may originate either from comprehensive and dedicated laws on whistleblower protection, or from specific provisions in different laws.⁵¹ The consensus towards greater protection for whistleblowers is important also for press freedom. In particular, the focus on implementing laws that are sufficiently foreseeable, clear, and precise so that potential whistleblowers know how those laws will be applied is a critical factor in encouraging them to come forward.

Relevant factors when considering whistleblowing in the context of private enterprise

24. This Court's case law on whistleblowers has developed in the context of a consideration of the article 10 rights of private or semi-private employees.⁵² In *Heinisch v Germany*, a case where the whistleblower worked for a limited liability company that was majority owned by a state entity, the Court recognised that article 10 was engaged and the balancing exercise undertaken between the public interest and any harm caused by the disclosure should be applied also where that information was obtained from a private entity: "The Court recalls in this context in a number of cases involving freedom of expression of civil or public servants, it has held that Article 10 applied to the workplace in general. It has further found that Article 10 of the Convention also applies when the relations between employer and employee are governed, as in the case at hand, by private law and that the State has a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals".⁵³ This approach is consistent with the broader trend toward states enacting whistleblowing protection laws that protect private employees.⁵⁴
25. Proceeding from the starting point that the proportionality assessment of any restriction on the right of freedom of expression will need to consider and give sufficient weight to the importance of that right in the context of the publication of public interest information, the Intervener submits that this Court should bear in mind certain factors, some of which are either not present or less prominent in the state employee context, that are relevant to cases involving whistleblowing and private employees.
26. First, seen from the perspective of the press, there are means available to obtain information from state institutions that do not exist in relation to private entities. This Court, in *Magyar Helsinki Bizottság v Hungary*, in stating that "the time has come to clarify the classic principles" held that it did not consider "that it is prevented from interpreting Article 10 (1) of the Convention as including a right of access to information".⁵⁵ In a key passage setting out the principle that applies in the context of requests for access to information held by

Anti-bribery Recommendation, which calls for the protection of whistleblowers in the public and private sector.

⁵¹ See for example United Kingdom, Public Interest Disclosure Act 1998; Ireland, Protected Disclosures Act (No.14 of 2014); Slovenia, Articles 23-25 of the Integrity and Prevention of Corruption Act, which was adopted in 2010 and subsequently amended in 2011, include protection for individuals in the public and private sectors who report corruption and unethical or illegal conduct; Japan's Whistleblower Protection Act (2006) provides protection from dismissal and unfair treatment for public and private sector whistleblowers who report to enforcement authorities, and, in some cases, to external parties such as labour unions and the media; New Zealand's Protected Disclosures Act 2000 (PDA) provides private sector whistleblower protection for employees who report, in good faith, serious wrongdoing in or by an organisation.

⁵² ECtHR, *Guja v Moldova* [GC], no. 14277/04, §72, ECHR 2008

⁵³ ECtHR, *Heinisch v Germany*, no. 28274/08, §44, ECHR 2011 (extracts)

⁵⁴ See for example §17 above

⁵⁵ ECtHR, *Magyar Helsinki Bizottság v Hungary* [GC], no. 18030/11, §149, 8 November 2016

the state, the Court held that the right “may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual’s exercise of his or her right to freedom of expression, in particular “the freedom to receive and impart information” and where its denial constitutes an interference with that right.”⁵⁶. In addition, national public account committees and parliamentary committees can provide a further means of obtaining information from state institutions. The unavailability of these methods of obtaining information from private entities reinforces the importance, for the press, of whistleblowers being able to disclose to them public interest information.

27. Second, the Court has, on a number of occasions, noted the “duty of loyalty, reserve and discretion” employees owe their employers.⁵⁷ The Court has gone on to say that “this is particularly so in the case of public service, since the very nature of public service requires its employees to be bound by such a duty”.⁵⁸ Disclosure by state employees of information obtained in the course of their work, even on matters of public interest, will therefore be examined in the light of those duties of loyalty and discretion.⁵⁹ While this type of relationship is a particular feature of whistleblowing, the Intervener respectfully submits that it should apply to a lesser degree where the disclosure of information is by a private employee. Support for this approach can be found in the particular emphasis the Court places on the existence of the duties outlined above in the context of public service.⁶⁰ The rationale for this approach can be found in the distinction between the aim of the state, which is or should be the public good, and the aim of private enterprise, which is profit.
28. Third, the Court has held that a state employee should enjoy whistleblower protection particularly where that individual is the only person, or part of a small category of persons, aware of what is happening at work and is therefore best placed to act in the public interest by alerting the employer or the public at large.⁶¹ This approach should apply at least to the same extent for private employees. The Court will note that in *Guja*, where it identified this factor as a relevant consideration in its analysis of the case, it relied on a statement from the Explanatory Report to the Council of Europe’s Civil Law Convention on Corruption which refers to both public and private employees: “In practice corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong.”⁶²

⁵⁶ *Id.*, §156

⁵⁷ ECtHR, *Vogt v Germany*, 26 September 1995, §53, Series A no. 323; ECtHR, *Kudeshkina v Russia*, no. 29492/05, §85, 26 February 2009; and ECtHR, *Langner v Germany*, no. 14464/11, §39, 17 September 2015.

⁵⁸ *Id.*

⁵⁹ See ECtHR, *Kudeshkina v Russia*, no. 29492/05, §93 and 94, 26 February 2009

⁶⁰ ECtHR, *Vogt v Germany*, 26 September 1995, §53, Series A no. 32.

⁶¹ ECtHR, *Guja v Moldova* [GC], no. 14277/04, §72 and 74; and ECtHR, *Heinisch v Germany*, no. 28274/08, §63, ECHR 2011 (extracts)

⁶² Council of Europe, *Explanatory Report to the Civil Law Convention on Corruption*, Treaty No. 174, (1999), §68, available at:

<https://rm.coe.int/16800cce45#:~:text=The%20Civil%20Law%20Convention%20aims,of%20obtaining%20compensation%20for%20damage>,

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