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A NEW PERSPECTIVE ON THE PROTECTION OF WHISTLEBLOWERS UNDER ECHR: *HALET V LUXEMBOURG*

Abstract.

The Luxleaks scandal, which had garnered widespread attention in 2014 and implicated A. Deltour and R. Halet, has taken a significant turn with the recent publication of the Grand Chamber's decision in favour of Mr Halet. Initially, Deltour was officially recognised as a whistleblower by the European Court of Human Rights (ECtHR) in defence of the actions he took, while Halet faced condemnation for lacking whistleblower status. Halet had previously brought his case before the ECtHR, alleging a violation of his right to freedom of expression. However, the ECtHR's judgment in February 2023 ultimately upheld the right to freedom of expression, marking a pivotal moment in this legal saga.

The judgment itself focused on two critical criteria for safeguarding whistleblowers within the framework of freedom of expression: assessing the damage caused to the employer and determining whether such damage could be outweighed by the public interest, as well as evaluating the severity of the imposed sanctions.

This contribution aims to provide a critical assessment of the Luxleaks case up until the the ECtHR's Grand Chamber decision. As this analysis will argue, the judgment holds immense significance as it introduces a fresh perspective on the notions of damage and public interest in the context of the Court's established jurisprudence concerning whistleblower protection.

Keywords: whisteblowers, freedom of expression, Halet, Luxleaks, Art 10 ECHR.

Introduction

In the much-debated Luxleaks case, the Luxembourg courts ruled for the first time on the concept of whistleblowing and its impact on criminal liability. It was not the first case involving scandals and whisteblowers in the recent years, as more and more similar stories get to the headlines of international media: 'Swissleaks', 'Panama Papers', 'Pandora Papers' and many more. It is clear that our world is changing and there are calls for more transparency and openness in different sectors of the economy.[1] This paper will focus on the Luxleaks case and its implications on the development of a pan-European approach towards whistleblower protection.

At first glance, it is a case concerning two employees of Pricewaterhouse-Coopers (PwC) accused of having taken confidential documents, which came to their possession in the course of their employment with the said company, and of having 'entrusted' them to Edouard Perrin, a journalist, in order to denounce the practice of tax optimisation practiced in Luxembourg. However, there are much wider implications and the decision of the Grand Chamber of the European Court of Human Rights (ECtHR) shed more light on the steps that whistleblowers need to follow and the criteria that they need to meet in order to get protection.

The Decisions of the three Luxembourg Courts

At first instance, Mr Deltour and Mr Hälet were charged with domestic theft, computer fraud, breach of professional secrecy, breach of business secrecy and money laundering. They were convicted by the Court of First Instance for all these offences.[2] They then appealed. The Court of Appeal convicted Mr Deltour for the offences of domestic theft, computer fraud and laundering-retention of the object of the domestic theft, offering him the necessary protection as a whistleblower for the breach of professional secrecy, which is a matter of public policy in Luxembourg.[3] Mr Hälet was not recognised as a whistleblower and was convicted of the offences of domestic theft, computer fraud, laundering-retention and the violation of his professional secrecy.[4]

Following the appeal in cassation lodged by Mr Deltour and Mr Hälet, the Court of Cassation handed down two judgments, one concerning Mr Deltour and one concerning Mr Halet. In the first case, the Court of Cassation confirmed the status of whistleblower as a ground for justification, while specifying that this status must apply in principle to all offences for

which a person, exercising their right guaranteed by Article 10 of the European Convention on Human Rights (ECHR), is prosecuted.[5] In the case of Mr Hälet, the Court rejected his appeal, confirming the judgment of the Court of Appeal.[6]

The Case Law of the European Court of Human Rights and its Application by the Luxembourg Court of Appeal

The Council of Europe (CoE) has, on several occasions, advocated the need to protect whistleblowers.[7] The most comprehensive text on this subject is its Recommendation CM/Rec(2014)7, where the term 'whistleblower' is defined as follows: "whistleblower means any person who reports or discloses information concerning threats or harm to the public interest in the context of their employment relationship, whether in the public or private sector."[8] Regardless of whether the specific definition is comprehensive or not, the fact that an international institution with the authority of the CoE decides to deal with this particular issue cannot be overlooked; it equals to a confirmation that the role of whisteblowers needs to be recognised and their protection should become a priority for all CoE Member States.[9]

The Grand Duchy of Luxembourg did not have specific legislation concerning the protection of whistleblowers when "Luxleaks" was taking place.[10] In the "Luxleaks" case, the Court of Appeal turned to the ECHR and more precisely to Article 10 on freedom of expression. It should be noted that Article 10 is not automatically a justification for the defendant to exclude his criminal liability. According to the case law of the Strasbourg Court, an employee is recognised as a whistleblower if they meet the criteria established by the Court. Its case law balances different interests in terms of the employee's freedom of expression. The Court defines the status of the whistleblower with its rights and obligations and its case law serves as a reference for the national judge in interpreting national law in such cases.

The ECtHR, in its landmark *Guja* judgment, established six criteria, which must be examined, in order to recognise a person as a whistleblower and protect them from unjustified interference with the right to freedom of expression. These six criteria are: the public interest in the information disclosed, the authenticity of the information disclosed, whether or not the accused had other means of making the disclosure, the weighing of the damage to the employer, the good faith of the whistleblower and the severity of the sanction imposed.[11]

With regard to the first criterion, the Luxembourg Court of Appeal found that it was fulfilled taking into account the impact, which the case had, at national and European level.[12] The second criterion is the authenticity of the information disclosed.[13] The Luxembourg Court did not engage in any exhaustive analysis as it was clear that the documents were authentic.[14] The third criterion is whether or not the defendant had other means to make the disclosure.[15] The Court of Appeal, same as the ECtHR,[16] made its assessment and found that the two defendants had no other means of disclosure than public disclosure.[17] The Court of Appeal then moved on to the fourth criterion, that of the damage suffered by the employer as a result of the disclosure and the interest that the public might have in obtaining this information.[18] On this criterion, the Court of Appeal made a different analysis for Deltour and Hälet. Following the example of the ECtHR, the Court of Appeal highlighted the damage suffered by PwC as a result of the disclosure of documents, but at the same time recognised, following an exhaustive analysis of the facts of the case, that the public interest in knowing this information is more important than the private interest of PwC and its clients; therefore, Mr Deltour fulfilled this test.

However, the Court of Appeal made a different assessment for Mr Hälet. More specifically, it considered that the reduced relevance of the documents submitted caused, in this case, a prejudice to his employer and also that the disclosure did not contribute anything to the general interest.[19] For this reason, the Court did not recognise him as a whistleblower. According to the established ECtHR case law, the six criteria are cumulative and must all be met in order for the whistleblower status to be recognised.

As Mr Deltour had successfully met the fourth criterion, the Court continued its assessment with the fifth criterion: the whistleblower's good faith.[20] The Court of Appeal relied again on the ECtHR case law and highlighted the fact that in all cases the person, who violated the law, professional secrecy or professional obligations, had the intention to blow the whistle. At the time of the extraction of the computer data, he did not yet have the "animus" of the whistleblower. For this reason, Mr Deltour couldn't enjoy the protection of Article 10 ECHR at the moment of appropriation of the documents, but only from the moment of passing them to the journalist. Following this distinction, the Court of Appeal continued to the last criterion, (the imposed sanction and its consequences).[21] The Court was deficient on this point, stating that Mr Deltour would not be penalised for having violated his professional secrecy.

The Whistleblower and the Criminal Defence

The Strasbourg Court has not accepted the status of the whistleblower as a ground for criminal justification in its jurisprudence. In the *Bucur and Toma* case, the applicant had a criminal conviction for whistleblowing. The Court was of the opinion that the criminal sanction was disproportionate and could create negative repercussions on his career and also have a deterrent effect to future whistleblowers.[22] In concluding its judgement, the Court noted, after weighing the interests at stake, that the interference with his freedom of expression was not necessary in a democratic society. Indeed, the Strasbourg Court did not recognise the status of the whistleblower as a justification for the offences committed, but that the criminal sanction was strict and not proportionate for the whistleblower.

At the national level, the Luxembourg Court of First Instance accepted that the two defendants were to be considered whistleblowers, but refused to consider this status as a justification for not being convicted. In the eyes of the court, the public interest of whistleblowing was insufficient and the defendants had exceeded the limits of their freedom of expression when they downloaded the company's confidential documents. They were free to criticise this morally dubious policy, but they were bound by a duty of loyalty, reserve and discretion to their employer.

The Court of Appeal convicted Mr Deltour for the offences of domestic theft, computer fraud, laundering-retention and possession of data acquired via theft, but was acquitted of the remaining offences (breach of professional secrecy and breach of trade secrets) on the basis of his status as a whistleblower. Mr. Hälet was convicted of the offences of domestic theft, computer fraud and money laundering and the violation of professional secrecy. He was only acquitted of the remaining offence (breach of trade secrets) as it was 'not established in law'.[23] However, the Court of Cassation overturned the decision of the Court of Appeal concerning Mr Deltour but confirmed the latter concerning Mr Hälet.

Good Faith and the Intent of the Whistleblower

The existence of good faith of Mr Deltour in this case cannot be questioned. The Court of Appeal, on this point, mentioned that "there is no doubt that Antoine Deltour did not act out of animosity towards his employer or to harm him. Nor did he act in a pecuniary interest".[24] However, the two courts differed in their reasoning on another important point, the

whistleblower's intention. The Court of Appeal was of the opinion that Mr Deltour did not intend to blow the whistle at the time that he downloaded the documents. More specifically, he had copied the documents for his own personal use in the event that he worked in the same sector. He thought he had copied documents relevant to his training and did not know that he had also copied the tax rulings.[25] Indeed, the Court of Appeal considered that he could not be protected as a whistleblower at the time of the "electronic data theft".

The Court of Appeal, using the case law of the Strasbourg Court as a starting point, highlighted the fact that initially Mr Deltour had no intention to blow the whistle. For this reason, Mr Deltour could not enjoy the protection of Article 10 of the Convention at the time of the appropriation of the documents. The Court observed that the theft cannot be justified *a posteriori* by his intention to eventually publish the documents. "Theft, being an instantaneous offence, cannot be invalidated by a later justification".[26]

Contrary to the approach of the Court of Appeal, the Court of Cassation followed a different path, always in line with the decisions of the Strasbourg Court. It noted that the ECtHR did not specify, as a condition for the protection of the whistleblower, his willingness to raise the alarm as soon as the documents were appropriated.[27] It should be noted that the Strasbourg Court has never set such a condition since it has never ruled on this point.[28] The only relevant point arises from the case of *Medžlis Islamske*, where the Court noted that "... the applicants did not in any way argue that their letter should be regarded as motivated by a desire to sound an alarm...."[29] It seems that the Strasbourg Court expects to see a genuine desire and intention to sound the alarm, but there is no further guidance in its case law so far.

The Luxembourg Court of Cassation followed a pragmatic and protectionist approach to the whistleblower. As it was stated, "whereas recognition of the status of whistleblower, based on an assessment of the facts as a whole, means that a conviction, particularly in criminal proceedings, would be regarded as interference by a public authority in the exercise of the right guaranteed by Article 10 of the Convention, which is not necessary in a democratic society for the purposes referred to in paragraph 2 of that Article."[30] In addition, it considered that the Court of Appeal erred on another point. The Court of Appeal retained the status of whistleblower as justification for Mr Deltour to hand over the documents to the journalist, but did not determine any other use of these documents (apart from their handover). The contradiction in the reasoning of the Court of Appeal lies in the fact that it grants the status of whistleblower as a justification for

handing over the documents, but at the same time it condemns him for laundering the use of these documents. The Court of Cassation made a specific reference to this inaccuracy, in order to strengthen its opinion on the recognition of the whistleblower status.

The Court of Cassation has not only taken into consideration the protection of the whistleblower under criminal law, but also the prohibition of restricting freedom of expression. It has offered protection to the whistleblower by recognising him as a cause of justification for the offences he has committed.[31] At this point, we can refer to another situation. If the Court of Cassation confirmed the decision of the Court of Appeal on this specific and important point, we should have had another concern: that of the sanction imposed on the whistleblower, which is the last criterion of the Strasbourg Court. The case law, up until now, is very restrictive on this point, considering even dismissal as a serious sanction.[32] In *Bucur and Toma* as well as in *Martchenko*, the Court considered that the criminal sanctions imposed on whistleblowers were excessive and constituted a violation of Article 10.[33] Therefore, even if the Court of Cassation followed the opinion of the Court of Appeal and the whistleblower was finally convicted of theft, then in the same case the Strasbourg Court should have recognised that such a sanction is disproportionate because of the interference with the freedom of expression.[34]

A New Cause of Justification in Luxembourgish Criminal Law

Luxembourgish criminal law recognises three grounds for justification: necessity, self-defence and legal order or authorisation.[35] Justifications remove the unlawfulness of the offending behaviour, thus removing the criminal responsibility of the perpetrator.[36] In this case, the Court of Cassation confirmed the decision of the Court of Appeal by recognising the status of the whistleblower as a cause of justification.[37] In addition, the Court of Appeal recognised the justifying fact of responsible journalism for Mr Perrin, but emphasis needs to be given to the justifying fact of whistleblowing recognised for Mr Deltour.[38]

In principle, a cause of justification is of statutory or case law origin.[39] Apart from the grounds of justification provided for by law, the courts may, in exceptional circumstances, apply this legal mechanism in order to resolve a conflict between legal provisions and insofar as the incriminated act is motivated by its social utility.[40] In this case, the Luxembourg courts relied on Article 10 ECHR and the case law of the ECtHR on whistleblowers

as a basis for their decisions.[41] In other words, the judges basically assess the supporting fact and this is either admitted or rejected on a case-by-case basis.[42] The Court of Cassation is the last court to assess this type of situation in law, and it has already enshrined certain justifying facts, such as the rights of the defence.[43]

In this case, the Luxembourg courts followed the reasoning of the Strasbourg Court regarding the need to balance the whistleblower's freedom of expression and information to the public against the need to preserve the confidentiality of certain information. The judges noted the importance of protecting freedom of expression, the social utility of the act performed and judged the different interests involved in favour of the whistleblower. The status of the whistleblower is a new cause of justification that raises legal questions for the future. It seems to us that this cause of justification could be a point of reference in similar cases in the future. Nevertheless, it is not clear whether this rule now represents the approach adopted by the Court of Cassation and this inevitably creates some uncertainty for the future whistleblower and the employer.[44]

Halet v Luxembourg: Applying Article 10 ECHR to Whistleblowers

The ECtHR used Article 10 ECHR and relied on *Guja v Moldova*, one of the most famous whistleblower cases at the CoE and European level for its first judgement on May 2021.[45] There was reference made to the six criteria that were developed in order to establish whistleblower protection under Article 10, with more emphasis on the last two criteria: the assessment of whether the damage to the employer outweighed the public interest and the sanctions imposed.

It is worth starting with the fifth criterion, as it forms an important element of the judgement, because the Court used all the previous saga on the information that they took from the Luxembourg Courts. Using all this information, the Court tried to have a holistic overview of the facts of the case before proceeding with this very delicate balancing exercise between the interest of the public and the interests of PwC.[46] In trying to do so, the Court made an interesting argument, admitting that PwC had a very difficult year, due to the implications of the case at question. However, there was not enough elaboration about Mr Halet's situation and circumstances in the context of this balancing exercise. Mr Halet definitely had a very difficult year as well, because he lost his job, he became stigmatised and

previous experience has showed that it will be extremely difficult for him to find employment in the near future.

This 'omission' was coupled with the surprising recognition that the value of the information contained in the documents revealed by Mr Halet was not cardinal, 'essential, new and hitherto unknown'.[47] It was not sufficiently justified why Mr Halet was seen in isolation from Mr Deltour. When there is a discussion about LuxLeaks, there are two people associated with this case, Mr Deltour and Mr Halet. Both of them exposed the wrongdoing and their contribution was equally instrumental for the building of the case. Mr Deltour was the one who initiated the exposure, but we cannot leave unrecognised the fact that Mr Halet was the one who provided the information about the magnitude of this case, which involved more than 300 companies having achieved favourable tax arrangements in Luxembourg, while Jean-Claude Juncker, President of the European Commission until 2019, was Prime Minister. Therefore, it is not adequately clear why the applicant's disclosures were found to be lacking sufficient interest to counterbalance the harm suffered by PwC and thus led to the conclusion that the public interest in the disclosure was insufficient to outweigh the damage suffered by the private employer. Such a conclusion is against the approach put forward by both the EU Whistleblower Directive and the Council of Europe's 2014 Recommendation on the protection of whistleblowers, which put in the forefront the damage that the employees suffer following their disclosure.[48]

The Strasbourg Court should have exercised more actively its supervisory role, especially considering the fact that the judges reviewed the case as a whole and took into account the relevant facts.[49] This could have been achieved without necessarily questioning the discretion exercised by the national courts, but just with reference to the Court's jurisprudence, in order to assess or not the interference was "proportionate to the legitimate aim pursued" or not. Mr Halet contributed to an ongoing public debate on the issues of tax avoidance and tax evasion schemes and it is not reasonable that the Court deviated from its previous position regarding such disclosures, which are of evident concern to the public at local, national and international level.[50] In addition, his contribution was made with full appreciation of the impact of his disclosures, in light of his professional expertise, the nature of his job and the duties he was performing. This is an argument, which can also be found in the case law of the Court of Justice of the European Union (CJEU) as well.[51]

It is beyond any doubt that Mr Halet acted in the general interest and this is why the courts recognised that there was no violation of trade se-

crets, he did not have any financial benefit himself, he never aimed to get one, and he did not intend to harm his employer directly. His motivation was just to inform the public. He acted driven by the wish to see a change in the existing tax practices of large multinational corporations and to increase tax transparency. There is a great resemblance between this case and the case of Edward Snowden, in the sense that his intention was very noble: to inform the public, the governments, the European Union and the financial markets as a whole about the need to promote transparency and tax fairness at a global level. Like in the case of Snowden, he initiated a public debate and the fact that the EU acted after his revelations confirms that there is a need for such debates, as they enhance the significance of living in a democratic society. We still do not know what the EU, Luxemburg or France will do in response to this case; after all, these issues take time, maybe nothing happens, but we, as a society, have the right to know and be informed about such cases. It is then up to us whether we want to do business with PwC, whether to buy their shares, whether to boycott or act in any way we want as free citizens.

One more point that can be made in relation to the balancing exercise and the public interest is in relation to a point made by judges Lemmens and Pavli in their dissenting opinion. More specifically, in determining whether the damage outweighs the interest of the public in receiving the information, the ECtHR should have assessed whether and to what extent the disclosure made was likely to cause damage to the State's national interests.[52] In other words, it is not only the employer that has to be taken into account, but rather the public interest component of that damage; "the subject matter of the disclosure and the nature of the [employer] concerned may be relevant" as additional elements when conducting the balancing exercise between the damage suffered and the public interest.[53]

The fact that Mr Halet's situation was not taken into appropriate consideration is also reflected when analysing the sixth criterion, the severity of the sanction imposed. At first, there was no reference made to the applicant's dismissal, after making his disclosure. In previous cases, when the employees were dismissed following their disclosure, the ECtHR has tended to consider the interference as disproportionate.[54] Another contradiction is in relation to the severity of the sanction imposed, because the Strasbourg Court has consistently held that the harsher the sanction, the more fear it will induce, creating a chilling effect on potential whistleblowers of the same profession or working in the same sector and consequently hinder any public debate.[55] However, in the case at question Mr Halet was ordered to pay a fine of 1,000 euros as well as the payment of a symbolic euro in damages to PwC

as reparation for the damages it suffered. According to the judgment, it was taken into consideration, as a mitigating factor, the “disinterested nature” of Mr. Halet’s actions and was therefore imposed a fairly modest fine. Such mild penalty fails to act as deterrent to other employees, who would want to follow the example of Mr Halet.

The question remains: If what Mr Halet did was so wrong, why he was not condemned more heavily; why the Court did not take the opportunity to send a message of zero tolerance: that if similar cases happen again, then there will be an even stricter penalty and a higher fine. At the same time, a criminal conviction and no recognition as a whistleblower will definitely deter future whistleblowers. In a country, such as Luxembourg, that relies heavily on financial services, the reputation of the financial market needs to be protected at all costs through the establishment of transparency, accountability and due diligence.[56]

Finally, there is something that was missing from this judgement; it is the fact that there was not much guidance about potential whistleblowers and what they should do in order to fulfil the abovementioned criteria and get protection. As this is a new topic for the ECtHR, it is essential to have as much guidance as possible, in order to comprehend the Court’s approach, philosophy and expectations. The more extensive the case law of the Court becomes, the more clarity potential whistleblowers will have, in order to make an informed decision as to whether they blow the whistle or not. Not everybody is a lawyer and it is not really easy to fully understand the legal considerations that need to be taken into consideration, so without such guidance, employees are in a very disadvantageous position. Furthermore, clarity was essential because it would benefit, not only the employees, but also the employers, i.e. the companies and their management, as they would be able to determine the scope of their right to prosecute whistleblowers for disclosing information. As mentioned earlier, a balancing exercise needs to be performed in each case under examination and companies can suffer setbacks in legal action against (former) employees, if they are not clear as to the legal criteria for recognising whistleblowers.[57]

The Grand Chamber’s Decision

After much anticipation, on 14 February 2023 the Grand Chamber delivered its judgment rectifying the previous decisions of the Luxembourg Court of Appeal and of the third Chamber of the ECtHR.[58] The Court stated that whistleblowers should be protected under Article 10 ECHR when

they report facts of public interest. The tax matters at hand were of public interest and the Court made a significant statement in that regard by protecting Mr Halet, who did not report an illegal practice or a wrongdoing, but "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".[59]

First, the Court clarified that the criteria should be examined without a specific order as there is no hierarchy or order to be followed in their examination. Concerning the balancing of the public interest in the disclosed information and the detrimental effect of the disclosure, the Court did not consider it as a conflict of rights (as suggested by the Luxembourg government). It examined, instead, whether the domestic courts struck a fair balance between, on the one hand, the public interest of the disclosed documents, and, on the other hand, the entirety of the harmful effects arising from their disclosure. The Grand Chamber stressed that the Luxembourg Court's requirement of "essential, new and previously unknown[60]" disclosed information is not relevant. A public debate on tax practices was already in progress in Luxembourg, thus additional information could come even at a later stage.

Secondly, on the issue of balancing the damage to the employer and the need of the public to be informed, the Court deviated from the previous decisions. While it acknowledged the detrimental effect of the disclosures on PwC, it noted that the Luxembourg Court of Appeal only referred to "damage to ...... image"[61], "loss of confidence"[62], and the "difficult year"[63] that PwC had following the Luxleaks investigations, but the Luxembourg Court only focused on the damaged sustained by PwC, disregarding 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.

Thirdly, in relation to the sixth criterion: the severity of the sanction imposed, the Court highlighted the importance of whistleblowers for the society, while stressing that any undue restriction on them may have a chilling effect on and dissuade potential whistleblowers to come forward. Regarding the criminal conviction of Mr Halet, it was found to be not proportionate in light of the legitimate aim pursued and Luxembourg's interference with Mr Halet's right to freedom of expression was not "necessary in a democratic society".[64] The Court awarded €15000 non-pecuniary damage and €40000 covering costs. It should not be overlooked that Mr Halet spent

almost ten years fighting this legal battle, so any assessment should consider the financial damage he suffered as well as the damage to his career and reputation. Overall, the Grand Chamber through this judgment sent a message that whistleblowers should be heard and not suppressed. After all, purpose of whistleblowing is not only to uncover and draw attention to information of public interest, but also to operate as 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.[65]

Conclusion

The Grand Chamber was entrusted with a very delicate task: on the one hand, to protect whistleblowers and the freedom of expression, and, on the other hand, to offer guidance as to when the interests of the injured party require to be given priority. The criteria developed in *Guja* constitute a good starting point and should not end up used as part of a box-ticking exercise. They should be used as guiding principles for a comprehensive review and analysis of each case under Article 10 ECHR. The Grand Chamber provided invaluable legal analysis in the areas of freedom of expression, whistleblower protection, public interest and tax practices. As it happens in most similar cases, one side is celebrating and the other side is complaining, however what we should keep for now is that the *Halet v Luxembourg* saga is very likely to be a judicial milestone in the area of whistleblower protection.[66]

NOTES

[1] In the 'Swissleaks' case, Hervé Falciani, a former employee of the HSBC Swiss bank, denounced the bank's policy which seemed to facilitate, *inter alia*, tax evasion and money laundering. In the 'Panama Papers' case, a whistleblower, who remains anonymous, denounced the policy of the law firm Mossack Fonseca (Panama) which seemed to facilitate, *inter alia*, tax evasion and tax avoidance.

[2] Judgment of 29 June 2016 in the so-called 'Luxleaks' case, District Court, Grand Duchy of Luxembourg. The journalist Mr Perrin was acquitted by the District Court for all the offences for which he was accused.

[3] Judgment of 15 March 2017 in the so-called "Luxleaks" case, Court of Appeal, Grand Duchy of Luxembourg.

[4] The Court of Appeal acquitted Mr Hälet of the offence of breach of business secrecy, noting that "by communicating the fourteen tax returns of PwC clients as well as two letters, he did not divulge data that would be considered as business or manufacturing secrets within the meaning of Article 309 of the Penal Code of his employer, as the

declarations constitute simple unilateral statements by the taxpayer as to his financial situation and his tax choices". For the same reason, Mr Deltour was also acquitted of the offence of violation of business secrecy.

[5] Judgment No. 3912 of 11 January 2018 concerning the appeal of Mr Antoine Deltour/Luxleaks, Court of Cassation, Grand Duchy of Luxembourg.

[6] Judgment No. 3911 of 11 January 2018 concerning the appeal of Mr Rapahaël Halet/Luxleaks, Court of Cassation, Grand Duchy of Luxembourg.

[7] For example, in the Council of Europe Criminal Law Convention of 27 January 1999 on Corruption (Article 22 on the protection of collaborators in court and witnesses) or Resolution 1729(2010) on the protection of whistleblowers.

[8] Recommendation CM/Rec (2014)7 adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 on the protection of whistleblowers.

[9] David Schultz and Khachik Harutyunyan, 'Combating corruption: The Development of Whistleblowing Laws in the United States, Europe, and Armenia' (2015) 1(2) International Comparative Jurisprudence 87, 92.

[10] Luxembourg had sectoral protection for whistleblowers. As the District Court noted: "In Luxembourg, this protection is found in the Labour Code and was introduced by a law of 13 February 2011 reinforcing the "protection of employees in the fight against corruption, influence peddling and illegal interest taking. The employee is thus protected from reprisals by his employer, i.e. from dismissal in the event of reporting these specific offences to the competent authorities." Moreover, the Court of Appeal noted that the two texts in Luxembourg law (Article L. 271–1 of the Labour Code and Article 38–12 of the Law of 5 May 1993) recognise the status of whistleblower, but they do not provide neither a definition nor the criteria for application. Luxembourg has now transposed Directive 2019/1937 on the protection of persons reporting breaches of Union law so there is a specific law for the protection of whistleblowers (https://mj.gouvernement.lu/dam-assets/dossiers/whistleblower/loi-du-16-mai-2023-portant-transposition-de-la-directive-ue-2019-1937.pdf).

[11] These six criteria were developed in the landmark judgment *Guja v Moldova* (App No. 14277/04, 2008). The Strasbourg Court has taken up these criteria in other judgments, such as *Heinisch v Germany* (App No. 28274/08, 2011).

[12] See *Luxleaks*, point 3 on the justifying causes. See also *Guja v Moldova*, paras 85–88 regarding the justifying fact of the whistleblower.

[13] *Guja v Moldova*, para 75.

[14] *Guja v Moldova*, para 89.

[15] *Guja v Moldova*, para 73.

[16] *Guja v Moldova*, paras 80–84.

[17] *Luxleaks*, Court of Appeal, point 3. The Court of Appeal confirmed the Prosecutor's opinion that the two defendants could not blow the whistle internally. It then agreed with Mr Deltour's representatives that he could not address the Luxembourg authorities because the ATAs were not of an illegal nature and justified their preference to address the public.

[18] *Guja v Moldova*, para 76.

[19] The Court of Appeal noted that: "the European Court examines the question of what is *necessary* for an effective warning, not in relation to the subsidiarity criterion, but when it weighs up the interests of the employer or the entity which has suffered damage as a result of the disclosure, and the interest which the public could have had in obtaining this information, i.e. when it balances the respective interests and assesses the respective

weight of the damage that the disclosure as made caused to the employer and the interest that the public could have had in obtaining the disclosure." See *Guja*, para 76.

[20] *Guja v Moldova*, para 77.

[21] *Guja v Moldova*, para 78.

[22] *Bucur and Toma*, paras 119–121.

[23] The Court of Appeal acquitted Mr Hälet of the offence of breach of business secrecy, noting that "by communicating the 14 tax returns of PwC clients as well as two letters, he did not disclose data that would be considered as business or manufacturing secrets within the meaning of Article 309 of the Penal Code of his employer, as the declarations constitute simple unilateral statements by the taxpayer as to his financial situation and his tax choices." For the same reason, Mr Deltour was also acquitted of the offence of violation of business secrecy.

[24] CA Luxembourg, 15 Mars 2017, n° 117/17 X.

[25] Ibid.

[26] Ibid.

[27] Judgment no. 3912, pg. 3.

[28] It seems to us that the Court has not been able to decide on such an issue. In the well-known cases, such as *Guja* or *Heinisch*, for example, the applicants in question raised the alarm as soon as they became aware of the illegalities in question. Freedom of expression includes the direct communication of information and preparatory acts committed to accomplish the act. For example, the Strasbourg Court in *Bucur and Toma v Romania* at paras 10 and 11 justified the theft of audio tapes containing illegal phone taps by the whistleblower in question because he needed them for the press conference, he had organised to denounce them publicly.

[29] *Medžis Islamske Zajednice Brčko and Others v Bosnia and Herzegovina*, App No. 17224/11, 27 June 2017, ECHR, para 80.

[30] Judgment No. 3912, pg. 3.

[31] The Court of Appeal ordered the suspension of delivery on 15 May 2018 following the referral of the Court of Cassation to the Court of Appeal otherwise composed. See La Justice, Arret De La Cour D'Appel – Autrement Composée – Dans Le Cadre De L'Affaire Dite "Luxleaks", http://www.justice.public.lu/fr/actualites/2018/05/arret-luxleaks-deltour/index.html

[32] *Guja v Moldova*, paras 95–96.

[33] *Bucur and Toma v Romania*, para 119. See also *Martchenko v Ukraine*, App No. 4063/04, 19 February 2009, ECHR, paras 53–54.

[34] This is justified by the fact that the Council of Europe and the European Court of Human Rights have shown, until now, a will to provide absolute protection for whistleblowers in the spirit of protecting freedom of expression. This desire is confirmed by the texts of the Council of Europe promoting the idea of better protection for whistleblowers and the case law of the Strasbourg Court.

[35] Dean Spielmann and Alphonse Spielmann, *Droit pénal général luxembourgeois*, (Bruylant, 2002), 282.

[36] Ibid.

[37] *Luxleaks*, para 47. See also Judgment no. 3912 Court of Cassation, para 5.

[38] *Luxleaks*, para 48.

[39] Emmanuel Dreyer, *Droit pénal général*, (2nd ed, LexisNexis, 2012), 752. See also J.J Haus, Principes généraux de droit belge, n° 603, Kuty, Principes généraux du droit pénal belge, "La justification de la faute constitutive de la responsabilité pénale", n° 1237–1241 and R. Merle and A. Vitu, Traité de droit criminel, T I, n° 364–366.

[40] The Court of Appeal and the Court of Cassation have recognised that Mr Deltour's disclosures were in the public interest. Furthermore, the Court of Appeal referred to the actions adopted by the European Union in relation to Luxleaks, such as the Council Directive (EU) 2015/2376 as regards automatic and compulsory exchange of information in the field of taxation and henceforth covering tax rescripts. Reference was also made to the investigations opened by the Commission concerning the tax treatments granted by Luxembourg to certain multinational companies and which have been qualified as state aid granting unjustified advantages to the beneficiary companies. See also Robert Attard and Paulo Pinto de Albuquerque, *Taxation at the European Court of Human Rights* (Kluwer, 2023), 9.6.

[41] Jean-Luc Putz, 'Interpretation of Luxembourg criminal law – concepts, interests and values in the interpretation of positive law', Travaux de l' association Henri Capitant, 31.

[42] Ibid

[43] Ibid, 34.

[44] Luxembourg has not yet transposed the Directive 2019/1937 on the protection of persons who report breaches of Union law (Directive on the protection of whistleblowers), which could clarify the situation in the near future.

[45] *Halet v Luxemburg*, App No 21884/18, Third Section, https://hudoc.echr.coe.int/eng#{%22appno%22:[%2221884/18%22],%22itemid%22:[%22001-210131%22]}

[46] Dimitrios Kafteranis, 'Analysis: "A New Perspective on the Protection of whistleblowers under the ECHR: *Halet v. Luxembourg*"' (2021) EU Law Live, https://eulawlive.com/analysis-a-new-perspective-on-the-protection-of-whistleblowers-under-the-echr-halet-v-luxembourg-by-dimitrios-kafteranis/

[47] Hava Yurttagül, 'LuxLeaks Scandal and Corporate Whistleblowing: Reflecting on 'Halet v Luxembourg'', (2021), Oxford Business Law Blog, 27 July 2021, https://www.law.ox.ac.uk/business-law-blog/blog/2021/07/luxleaks-scandal-and-corporate-whistleblowing-reflecting-halet-v

[48] Ibid.

[49] See *Hertel v. Switzerland*, App No. 59/1997/843/1049, ECtHR Judgment of 25 August 1998, para. 46

[50] *Bladet Tromsø and Stensaas v. Norway* [GC], App No. 21980/93, Judgment of 20 May 1999, para. 63. See also *Guja*, para 87; *Heinisch*, para. 91 and *Bucur and Toma*, para 101.

[51] Case T-530/12 P, *Bermejo Garde v EESC*, Judgment of 8 October 2014, ECLI:EU:T:2014:860, para. 152 and Case F-41/10 RENV, *Bermejo Garde v EESC*, Judgment of 2 June 2016, ECLI:EU:F:2016:123, para. 84.

[52] *Halet* Dissenting Opinion, para 6.

[53] *Guja*, para. 76. See also App No. 69698/01, *Stoll v Switzerland* [GC], 10 December 2007, para. 130 and App No. 12945/87, *Hadjianastassiou v Greece*, 16 December 1992, para. 45.

[54] *Guja*, para 95 and *Heinisch*, para 91. See also App. No. 73571/10, *Matúz v Hungary*, 21 October 2014, para. 48.

[55] *Guja*, para. 95; *Heinisch*, para 91; *Bucur and Toma*, para 119. See also App No. 4063/04 *Marchenko v Ukraine*, 19 February 2009, para 51 and App No. 29492/05, *Kudeshkina v Russia*, 26 February 2009, paras 99–100.

[56] See Umut Turksen, 'The Criminalisation and Protection of Whistleblowers in the EU's Counter-Financial Crime Framenwork' in K. Ligeti and S Tosza, White Collar Crime: A Comparative Perspective, (Hart, 2019), 346–7.

[57] O. Ouriemmi, W. Ben Khaled and M. Fanchini, 'Whistleblowers or Offenders? A Judicial Approach to Whistleblowing – The LuxLeaks Case', (2021) M@n@gement, 24(4), 1–17, 13.

[58] *Halet v Luxemburg*, App No 21884/18, Grand Chamber, https://hudoc.echr.coe.int/eng?i=001-223259

[59] Ibid, para 138.

[60] Ibid, para 61.

[61] Ibid, para 200

[62] Ibid.

[63] Ibid, para 15.

[64] Ibid, para 206.

[65] D. Kafteranis and S. Andreadakis, '*Halet v Luxembourg*: A Victory of the Unsung Heroes' (EU Law Analysis, 24 February 2023) http://eulawanalysis.blogspot.com/2023/02/halet-v-luxembourg-victory-of-unsung.html

[66] S. Andreadakis and D. Kafteranis, '*Halet v Luxembourg*: The Final Act of the Luxleaks Saga' (Oxford Business Law Blog, 21 February 2023), https://blogs.law.ox.ac.uk/oblb/blog-post/2023/02/halet-v-luxembourg-final-act-luxleaks-saga