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Comment on ECtHR, decision *Halet v. Luxembourg* *("Lux Leaks"* case)

Does the criterion of "public interest" always imply checking whether the disclosed information is also "contributing to a public debate on a matter of general interest"?[1]

Amélie Lachapelle[2, 3]

Introduction

1. In a judgment delivered on 11 May 2021, the Third Chamber of the ECtHR ruled, by five votes to two, that the criminal conviction of the second "Lux Leaks" whistleblower, Raphaël Halet, for disclosing tax documents about several clients of his employer, PricewaterhouseCoopers (PwC), does not violate his right to freedom of expression.[4]
The judgment refines the principles established by the Court in the context of its case law on whistleblowers, developed from the "*Guja*" judgment, which constitutes a judgment of principle.[5] However, it must be noted that the interpretation given here departs significantly from the clarifications that were expected in this area. This was the reason why the applicant requested that the case be referred to the Grand Chamber on 18 June 2021.[6] This request was accepted by the Grand Chamber panel on 6 September. The Court held a hearing in this case on the 2 February 2022.[7] Indeed, the judgment under review seems to validate a development already observed in practice, namely that the European Court of Human Rights sometimes no longer confines itself to verifying, based on Article 10 of the ECHR, that the information disclosed "is of public interest", but also that it is likely to "contribute to a public debate on a matter of public interest".[8]
2. After having briefly summarized the facts at the origin of the "*Lux Leaks*" case (I.), we set out the jurisprudential framework in which the judgment delivered by the Court on 21 May 2021 falls, that of "whistleblowing cases" (II.). We then comment on and criticize the Court's analysis in the case in question (III.).

I. The facts of the case: the *"LuxLeaks"* scandal

3. At the material time, Raphaël Halet, a French national, was employed by PwC. Classified as one of the "Big Four", the world's four largest auditing and consulting firms – PwC, Deloitte, Ernst & Young (E&Y) and KPMG – this company's tasks include filing tax returns in the name and on behalf of its clients and, where necessary, requesting "Advance Tax Agreements" (ATAs) from the tax authorities. These advance tax rulingsaim to obtain an opinion from the tax authorities on the tax regime applicable to future operations in the interests of legal certainty.
Following a (French) television news report (which marked the first stage of the "*Lux Leaks*" case), the applicant decided to copy 16 internal documents – 14 tax returns and 2 accompanying letters – and hand them to the journalist mentioned in the report.
An internal investigation identified the perpetrator of the first leak. It was the "first" Lux Leaks whistleblower, Antoine Deltour[9], who was finally acquitted by the Luxem-

1. The author would like to warmly thank Alejandra Michel, a researcher at CRIDS/NaDI and lecturer at UNamur, for the careful proofreading of this paper and the thoughtful remarks made on this occasion.
2. Doctor of Legal Sciences. Senior Lecturer at the UNamur and Senior Researcher at the CRIDS/NaDI.
3. Material as of 1st November 2021.
4. For an initial reaction to this judgment, see the commentary by J. Schwarz, "Luxleaks: Whistleblowing and human rights", *Kluwer International Tax Blog*, 22 June 2021. See also A. Lachapelle, "When the public interest of the disclosed information is no longer enough for activating the safeguards derived from Art. 10 of the European Convention on Human Rights", *Kluwer International Tax Blog*, 19 October 2021.
5. ECtHR (gr. ch.) 12 February 2008, *Guja / Moldova*.
6. Press Release of 6 September 2021, *ECHR* 261 (2021).
7. The arrest in this case will be commented in a next number of the *TFR*.
8. On this twofold approach, see Q. Van Enis, *La liberté de la presse à l'ère numérique*, Bruxelles, Larcier, 2015, Nrs. 106-133.
9. Antoine Deltour stole more than 45,000 pages of internal training documents and documents relating to Advanced Tax Agreements (ATAs) of 400 of PricewaterhouseCoopers clients, approved by the Luxembourg Tax Administration.

bourg court. A second internal investigation conducted by PwC led to the applicant, Raphaël Halet, the "second" Lux Leaks whistleblower.

On 5 June 2012, PwC filed a complaint with the Luxembourg Public Prosecutor's Office on charges of theft, breach of professional secrecy and laundering and possession (*blanchiment-détention*).

Eventually, at the end of the domestic legal proceedings, Raphaël Hallet was denied whistleblower status on the grounds that the documents sent to the French journalist merely illustrate, without adding anything new, a public debate already initiated by the revelations of Antoine Deltour a few months earlier.

He then decided to bring the case to the ECtHR. He believes that the criminal conviction against him, following the disclosure to a journalist of 16 documents from his employer, PwC, constitutes a disproportionate interference with his right to freedom of expression as enshrined in Article 10 of the Convention.

II. The criteria established by the *"Guja"* case-law

4. Neither the ECHR nor its additional protocols expressly recognize the right of reporting[10], whether this right is understood in its traditional sense as the reporting of unlawful acts to a state body or in its modern sense as the reporting of an infringement or threat to the public interest.[11]

When called upon to rule on the legitimacy of sanctions taken against an individual following an act of whistleblowing, the ECtHR agreed to examine the issue from the perspective of Article 10 of the Convention, and especially the right of criticism and the right to share information.

The Court's case-law in whistleblowing is innovative and has been built halfway between two other bodies of case law: the case law on freedom of the press and its reconciliation with the right to respect for reputation, on the one hand, and the case law on the reporting of alleged irregularities in the conduct of public officials, on the other.[12] The former applies to journalists and "watchdogs"[13], while the latter applies to "citizen-administrators".[14]

In the context of a report by a whistleblower, the ECtHR has established six principles – or "factors" – to guide the judge's assessment of the proportionality of the interference.[15] While the precise status of the criteria identified by the Court has been the subject of debate amongst academic scholars[16], it is clarified here. The principles identified by the Court condition the application of the protective status of whistleblowers, which prevents any conviction of an individual by the domestic courts (criminal, civil, administrative or disciplinary) for having exercised his or her right to freedom of expression in connection with a whistleblowing case. In Luxembourg law, this status has the specific effect of neutralizing the illegality of the violation of the law.[17]

In determining the proportionality of an interference with a worker's freedom of expression in a whistleblowing case, the Court firstly verifies whether the applicant had alternative channels for the disclosure (i). Public disclosure should be a last resort. Then, particular attention is paid to the public interest involved in the disclosed information (ii). Another factor relevant to this balancing exercise is the authenticity of the information disclosed (iii). 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 (iv). The motive behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not (v). Lastly, attentive analysis of the penalty imposed on the applicant and its consequences is required (vi).[18]

10. Conversely, it should be noticed that Art. 21.1 of the DSA stipulates that very large online platforms have a duty to notify suspicions of criminal offences (micro or small enterprises excluded). According to this provision, "where an online platform becomes aware of any information giving rise to a suspicion that a serious criminal offence involving a threat to the life or safety of persons has taken place, is taking place or is likely to take place, it shall promptly inform the law enforcement or judicial authorities of the Member State or Member States concerned of its suspicion and provide all relevant information available". If the text doesn't use either the term "informing" or "denunciation" ("notification" in the English translation and "signalement" in the French translation), the parallel is obvious with Art. 30 of the Belgian Code of criminal procedure. This provision, which establishes the "civic denunciation" (or "private"), states that "toute personne qui aura été témoin d'un attentat, soit contre la sûreté publique, soit contre la vie ou la propriété d'un individu, sera pareillement tenue d'en donner avis au procureur du Roi soit au lieu du crime ou délit, soit au lieu où l'inculpé pourra être trouvé".

11. On this distinction, A. Lachapelle, *La dénonciation à l'ère des lanceurs d'alerte fiscale*, *o.c.*, Nrs. 992 *et seq.*

12. With this in mind, see K. Blay-Grabarczyk, "Le statut du lanceur d'alerte dans les arrêts de la Cour européenne des droits de l'homme", *Rev.trim.DH* 2018, n° 116, p. 855-862.

13. Journalists are not the only ones to be granted "watchdog" status by the ECtHR. For example, non-governmental organizations, academic researchers, authors of books on subjects of public interest, bloggers and popular users of social media have been granted this status (A. Lachapelle, *La dénonciation à l'ère des lanceurs d'alerte fiscale, o.c.*, Nr. 1092). On this subject, see C. de Terwangne and A. Michel, "Processing of personal data for 'journalistic purposes'" in J. Herveg (ed.), *Deep Diving into Data Protection*, Bruxelles, Larcier, 2021, p. 206-207. See also Q. Van Enis, "La liberté d'expression des 'journalistes' et des autres 'chiens de garde' de la démocratie" in A.C. Rasson, N. Renuart and H. Vuye (eds.), *Six figures de la liberté d'expression*, Limal, Anthemis, 2015, p. 12 *et seq.*

14. On this distinction, see A. Lachapelle, *La dénonciation à l'ère des lanceurs d'alerte fiscale, o.c.*, Nrs. 1087 *et seq.*

15. § 22 of the "*Halet*" judgment.

16. A. Lachapelle, *La dénonciation à l'ère des lanceurs d'alerte fiscale, o.c.*, Nrs. 1115 *et seq.*

17. § 18 the "*Halet*" judgment.

18. For a review of those principles, see Q. Van Enis, "Une solide protection des sources journalistiques et des lanceurs d'alerte: une impérieuse nécessité à l'ère dite de la 'post-vérité'?" in Y. Ninane (ed.), *Le secret*, Limal, Anthemis, 2017, p. 95-151; V. Junod, "Lancer l'alerte: quoi de neuf depuis Guja (Cour eur. D.H. 8 January 2013, *Bucur et Toma / Roumanie*)?", *Rev.trim.DH* 2014, n° 98, p. 459-482; K. Rosier, "Chapitre III: hypothèses dans lesquelles une violation des obligations de secret ou de confidentialité pourrait être admise, Section 1. Whistleblowing" in S. Gilson, K. Rosier, A. Roger and S. Palate (eds.), *Secret et loyauté dans la relation de travail*, Waterloo, Kluwer, 2013, p. 129-150.

III. The application of the "*Guja*" case-law in the "*Lux Leaks*" case

5. The parties agreed that the applicant's conviction for passing on confidential documents to a journalist who had subsequently published them constituted an "interference by a public authority" with his exercise of his freedom of expression.

Pursuant to Article 10 of the ECHR, such an interference will constitute a breach of Article 10 unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 of Article 10 and was "necessary in a democratic society" for the achievement of those aims.

As is often the case, the first two conditions were easily accepted in the decision under review. The applicant's criminal conviction was based on various provisions of the Luxembourg Criminal Code. Furthermore, it pursued a legitimate aim, since it was aimed at protecting the rights of others, namely preventing the disclosure of confidential information and protecting the reputation of the applicant's employer, PwC.[19]

The parties agree that the core of the discussion concerns the condition of "necessity in a democratic society" and more specifically the fifth (harm caused by the whistleblowing to the employer) and sixth (punishment of the whistleblower) criteria applied by the ECtHR in whistleblowing cases.[20]

A. Conditions for the application of the "Guja" case-law: the applicant must be a whistleblower

6. Before applying the criteria established by the "*Guja*" case-law[21], the ECtHR verifies whether the applicant can be recognized as a "whistleblower". This status is a condition of the application of this case-law.

Two factors are decisive. On the one hand, the existence of a hierarchical bond between the applicant and the organization from which the information was stolen, the company PwC, is considered. This bond creates a duty of loyalty, reserve and discretion on the part of the employee towards the employer, which constitutes "a particular feature of the concept of whistleblowing".[22] It is agreed that this duty places the employee in a position of economic vulnerability vis-à-vis his employer. On the other hand, the *employment context* of whistleblowing is relevant. The Court notes that the confidential documents copied by the applicant and delivered to the French journalist were discovered and collected in the context of his employment relationship.

In the light of these considerations, the ECtHR draws a parallel with the situation in which the applicants in the "*Guja*" and "*Heinisch*"[23] cases found themselves and in which whistleblower status was recognized.

Accordingly, the ECtHR rules that the applicant must be considered "*a priori*" as a whistleblower within the meaning of the "*Guja*" case-law.

7. By giving the relevant legal framework and practice, the Court draws attention to the clarification provided by UN Special Rapporteur David Kaye. According to him, whistleblowing is "not always about specific unlawful acts, it can be about revealing concealed information that is in the legitimate public interest to know".[24] In its judgment, the Court does not, however, rule on the legality of the activities exposed by the applicant, as this is a matter for the national courts.

However, the clarification is important in the field of taxation, since the boundary between what is tax fraud and what is the right to choose the most efficient tax is sometimes porous. The reference to the Special Rapporteur's observations is also noteworthy, since the Court may have suggested in the past that whistleblower protection applied only to the reporting of "illegal conduct or wrongdoing in the workplace"[25], or even only to a "criminal offence".[26]

8. Both criteria highlighted by the ECtHR – economic vulnerability and discovery in a work-related context – were partially[27] endorsed by the European legislator in the Directive on whistleblowers.[28] According to Article 5, 7. of the above mentioned Directive, a "reporting person" "means a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities".

It should be noticed that the Directive on whistleblowers is not intended to protect the reporting of any infringement or threat to the public interest, but only of those infringements – illegal or abusive activities – which are considered as such by the European legislator. Among the many areas covered by the Directive is the field of taxation, but this is limited in terms of the Union's competences to the completion of the internal market. Only cross-border company taxation is therefore covered by the material scope of the Directive. The

19. § 87 of the "*Halet*" judgment.
20. §§ 65, 77 et 78 of the "*Halet*" judgment.
21. ECtHR (gr. ch.), 12 February 2008, *Guja / Moldova*. For a review of this case-law, see V. Junod, "La liberté d'expression du whistleblower. Cour européenne des droits de l'homme (Grande Chambre), Guja c. Moldova, 12 février 2008", *Rev.trim.DH* 2099, Nr. 77, p. 227-260; A. Lachapelle, *La dénonciation à l'ère des lanceurs d'alerte fiscale*, *o.c.*, Nrs. 643-652 and 1117-1150.
22. § 91 of the "*Halet*" judgment.
23. ECtHR (5th sect.) 21 July 2011, *Heinisch / Germany*.
24. § 53 of the "*Halet*" judgment.
25. ECtHR (5th sect.) 17 September 2015, *Langner / Germany*, § 44.
26. ECtHR (5th sect.) 17 September 2015, *Langner / Germany*, § 47.
27. Under Art. 4 of the Directive on whistleblowers, a hierarchical bond is not needed. Recital 36 puts the focus on the position of economic vulnerability.
28. Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. For a comprehensive study of this directive in the tax area, see A. Lachapelle, "And thus Tax Whistleblowing was born! Comment on the Directive on whistleblowers in Tax Matters", *TFR* 2020, Nr. 588, p. 798-818.

problem of tax rescripts highlighted in the *Lux Leaks* case obviously falls within this field.
In the area of taxation, it may be appropriate to extend whistleblower status beyond the context of a work-related relationship to include "traditional" reporting.

B. The validating of the Luxembourg judges' reasoning

9. The ECtHR notes that the only disagreement concerned the fifth and sixth criteria, namely the balancing of the public interest in receiving the information against the harm caused to the employer by the disclosures, and the proportionality of the penalty.[29]

1. Non-compliance with the fifth criterion: the harm suffered by the employer outweighed the public interest in the disclosed documents

10. The ECtHR was sensitive to the "exhaustive and convincing explanations provided by the Luxembourg Government"[30] that the Court of Appeal had made a concrete assessment of the non-material damage suffered by PwC before balancing the respective interests. The fact that the amount of the non-material damage suffered by PwC was set at a symbolic one euro does not call into question the existence of the damage. This can be explained by the widespread practice in Luxembourg of not paying a victim – whether a natural or legal person – for his or her non-material damage.[31]
Furthermore, the ECtHR considers that the media treatment of the case leaves no doubt as to the damage suffered by PwC, resulting, in particular, from the damage to the firm's reputation and the loss of client confidence in its internal security arrangements.[32] At the same time, the Court acknowledges that PwC has "had a difficult year" but "beyond this difficult period" has seen its turnover grow, as well as the number of its staff.[33]
11. More substantively, the Court focuses on the reasons given by the national courts regarding the interest of the disclosures made by the applicant.[34] In so doing, the Court examines the public interest served by the information disclosed by the applicant, namely 14 tax returns and 2 accompanying letters. The scrutiny is, however, marginal in that it focuses on the reasons given by the national courts. In practice, this amounts to delegating to the national courts the task of deciding whether or not information is in the public interest.
The rationale of the Luxembourg Court of Appeal can be summed up in two sentences: "(…) the documents provided by [the applicant] to the journalist had neither contributed to the public debate on the Luxembourg practice of [tax rescripts] nor triggered [a] debate on tax evasion or provided essential, new and previously unknown information".[35]
According to the ECtHR, this conclusion is based on careful reasoning, which it summarizes as follows.[36]
Firstly, the Luxembourg courts consider that the documents taken by the applicant do not contain any revelation as to the attitude of the Luxembourg tax authorities towards the tax optimization techniques used by PwC's clients. In fact, they are only company tax declarations, i.e. unilateral statements by taxpayers about their asset or financial situation.[37] Moreover, these documents were selected by the applicant only with regard to the reputation of the taxpayers concerned, and not because of their ability to illustrate how the tax rescripts disclosed are reflected, for example, in the tax returns of their beneficiaries.[38]
Secondly, the practice of tax rulings revealed by the applicant, at the time of the appropriation of the disputed documents and their being given to the journalist Edouard Perrin, had already been revealed by that same journalist thanks to the documents stolen by Antoine Deltour.[39] The applicant was perfectly aware of this since it was following the broadcast of the first program by the magazine Cash Investigation on the subject, based on these documents, that he took the decision to copy the disputed documents. Finally, the documents stolen by the applicant were used, not to illustrate the practice of tax rescripts, but to support a second program of the magazine Cash Investigation devoted to tax evasion and "the billions we are missing". Two groups of multinational companies were targeted for their tax planning schemes.
While recognizing that the information relating to the two groups of multinational companies targeted in the second Cash Investigation program may "challenge and scandalize", the Luxembourg Court of Appeal ultimately considers that it does not constitute "essential or fundamentally new information". In this respect, the facts must, according to the Luxembourg judge, be distinguished from those at the origin of the "*Fressoz and Roire*" case brought before the ECtHR. In that case, a tax return had also been published

29. § 92-93 of the "*Halet*" judgment.
30. § 99 of the "*Halet*" judgment.
31. § 99 of the "*Halet*" judgment.
32. § 100 of the "*Halet*" judgment.
33. § 8 et 101 of the "*Halet*" judgment.
34. § 103 of the "*Halet*" judgment.
35. § 28 and 104 of the "*Halet*" judgment. In the original version:"(…) les documents remis par [le requérant] au journaliste n'avaient ni contribué au débat public sur la pratique luxembourgeoise des [rescrits fiscaux] ni déclenché [un] débat sur l'évasion fiscale ou apporté une information essentielle, nouvelle et inconnue jusqu'alors."
36. § 105 of the "*Halet*" judgment.
37. § 30 of the "*Halet*" judgment.
38. § 31 of the "*Halet*" judgment.
39. § 32 of the "*Halet*" judgment.

in the media – the newspaper "*Le Canard enchaîné*" – but it usefully illustrated a current event, a social conflict within the company Peugeot. As will be shown below, the Court's reasoning in this case tends, on the contrary, to hold that the documents published in this case are of public interest.

12. The character marginal of the scrutiny conducted by the ECtHR is justified in the light of the margin of appreciation available to the contracting states in this area.

Only if there are "strong reasons" can the Court substitute its own view for that of the domestic courts. The Court notes that the Court of Appeal carried out a thorough analysis of the interest of the applicant's disclosures. It did not deny the general interest presented by the disclosures, but this interest was less than the damage suffered by PwC.[40] In support of this reasoning, the Court of Appeal emphasized that the documents revealed by the applicant did not provide "vital, new and previously unknown" information.

The Court of Appeal undoubtedly remained within the limits of its margin of appreciation in this matter. The fact that the other whistleblower in question, Antoine Deltour, was recognized as a whistleblower supports, according to the Strasbourg Court, its conclusions that the Luxembourg Court of appeal provided a thorough and detailed analysis of the facts.[41]

Nevertheless, such a decision has the effect of considerably tightening the cardinal criterion on which the "*Guja*" case-law is based, that of public interest, as we show in the third point of our commentary, since it involves, ultimately, verifying whether the information revealed by the whistleblower contributes to a public debate on a matter of general interest. Until then, the Court only checked whether the documents revealed concerned "very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate".[42]

2. Non-compliance with the sixth criterion: the sanction imposed on the whistleblower is not disproportionate and does not have a real chilling effect

13. The ECtHR considers the punishment to be "relatively moderate"[43] in that the domestic courts have again made a detailed assessment. In setting the sentence, they took into account, as a mitigating circumstance, "the motive which he thought to be honorable and the disinterested nature of his act, which are equivalent to mitigating circumstances, as well as the fact that he had no previous criminal record".[44] The applicant was sentenced to a fine of "a rather small amount" (1,000 EUR).[45] The Luxembourg Court of Appeal also decided to disregard a prison sentence. In the civil case, the Court confirmed the applicant's order to pay a symbolic one euro as compensation for the non-material damage suffered by PwC.

In the Court's view, it is not unreasonable to assume that the penalty imposed should not have a real deterrent effect on the exercise of freedom of expression by the applicant or other potential whistleblowers. On the other hand, such a sanction "prompts reflection on the legitimacy of the approach envisaged".[46]

14. By taking into account the "disinterested nature" of the applicant's action, however, the domestic courts did nothing more than take account of the applicant's status as a whistleblower. It follows from the case-law of the ECtHR that a person whose reporting is motivated by personal interests cannot benefit from whistleblower status.[47] This is therefore not a mitigating circumstance, but an element that contributes to the very definition of whistleblower status.

On the other hand, there are serious doubts as to whether the penalty imposed on the applicant is really "relatively moderate", since the fine imposed must be added to the legal costs incurred by the applicant since the beginning of the procedure, which was initiated by PwC in 2012.

Moreover, given the notoriety acquired by the applicant once the trial became public[48], it is reasonable to assume that he encountered difficulties in finding a job following his dismissal by PwC. Although the applicant's prison sentence was suspended, it is difficult to imagine that he has otherwise a totally calm mind. While he thought he was performing a civic duty and serving the public interest, "his country" found him guilty.

Furthermore, the very principle of a sanction is questionable. From the moment that the status of whistleblower is recognized by a judge, one wonders how a fine, which tends to sanction the exercise by the latter of his right to freedom of expression, could be considered proportional. In addition, it seems to us dangerous to legitimize, as the Court does, the imposition of a sanction on the grounds that it "prompts reflection on the legitimacy of the approach envisaged". Such a case-law – a bit moralistic – clearly risks dissuading potential whistleblowers ("chilling effect") whereas

40. § 109 of the "*Halet*" judgment.
41. § 110 of the "*Halet*" judgment.
42. ECtHR (gr. ch.) 12 February 2008, *Guja / Moldova*, § 88; ECtHR (3th sect.) 8 January 2013, *Bucur / Romania*, § 103.
43. Punishment "relativement modérée" in the original version. See § 111 of the "*Halet*" judgment.
44. They took into account "du mobile qu'il pensait honorable et du caractère désintéressé de son geste, qui valent circonstances atténuantes, ainsi que de l'absence d'antécédents judicaires dans son chef" in the original version. See § 111 of the "*Halet*" judgment.
45. Fine "d'un montant plutôt faible" in the original version. See § 111 of the "*Halet*" judgment.
46. The sanction "incite à réfléchir sur le caractère légitime de la démarche envisagée" in the original version. See § 111 of the "*Halet*" judgment.
47. According to consistent case-law, "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" (see, for instance, ECtHR (gr. ch.) 12 February 2008, *Guja / Moldova*, § 77; ECtHR (5th sect.) 21 July 2011, *Heinisch / Germany*, § 69; ECtHR (3th sect.) 8 January 2013, *Bucur / Romania*, § 93; ECtHR (2nd sect.) 19 January 2016, *Görmüş et al. / Turkey*, § 50; ECtHR (2nd sect.) 21 October 2014, *Matuz / Hungary*, § 45).
48. Raphaël Halet remained anonymous until the start of the court case because of a confidentiality agreement signed with PwC.

their legal protection, and more broadly the protection of the right to freedom of expression, pursues precisely the opposite objective. Remember that in the words of the Court itself in its *Guja* judgment, "free discussion of issues of public interest is essential in a democracy and citizens must not be discouraged from speaking out on such issues".[49]

C. The main criticisms of the Court's reasoning

16. The minority judges have rightly expressed surprise at the ECtHR's choice to endorse the conclusions reached by the domestic courts. We summarize our criticisms around three points.

1. Disclosed information must be of public interest "of a certain degree of seriousness"

17. From the moment the ECtHR accepts that the information disclosed by the applicant is of public interest, it is hard to understand why it nevertheless agrees with the Luxembourg Court of Appeal's conclusion that the disclosures of the applicant are of lesser interest – interest which is real and recognized – than the damage suffered by PwC – damage which remains hypothetical and, in any case, very limited.

According to an interpretation confirmed by the minority judges[50], the authors agreed that the examination of the fifth criterion was a formal examination as soon as the information disclosed was deemed to be of public interest.[51]

The position adopted by the Luxembourg courts and accepted by the ECtHR, however, is that the public interest should be "of a certain degree of seriousness".

It is true that some of the ECtHR's judgments have suggested that whistleblower protection could only be activated if the violation of the public interest reaches a significant threshold of seriousness.[52] However, other of the Court's judgments suggest otherwise. This suggests that information whose publication is not intended solely to satisfy the curiosity of a certain public about the details of a person's private life could be regarded as information whose publication contributes to a public debate on a matter of general interest.[53]

18. Actually, the ECtHR has been very receptive to the contextual analysis proposed by the Luxembourg courts.

The remarks made by the domestic courts regarding the relevance of the documents disclosed by the applicant appear, it is true, to be well founded. The tax returns concealed by the applicant do not *directly* illustrate the practice of tax rulings. However, they *certainly* illustrate the type of tax arrangement that can be endorsed by the tax authorities in a tax ruling.[54]

As the minority judges note it, it is clear from Edouard Perrin's statements in the media that certain revelations made during the second *Cash Investigation* program would not have been possible without access to the documents at issue. The arguments put forward by the applicant before the national courts to demonstrate the public interest presented by the stolen documents are, moreover, convincing. The stolen documents were so relevant that the investigative journalist decided to use them, to publish them in a program and to pass them to the ICIJ. The minority judges rightly point out that the investigative journalist was well placed to appreciate the importance of the applicant's revelations for the ongoing public debate on the issue.[55]

The stolen tax returns would undoubtedly have had more weight in proving the extent of the tax optimization techniques used by the multinationals and endorsed by the tax authorities if they had been more numerous. That said, the applicant can hardly be criticized for having stolen only a sample of data rather than a mass of data. The decision to copy only a sample of data, leaving it to the public authorities to investigate and, if necessary, seize more, in compliance with the rules of criminal procedure, seems to strike a fair balance between the rights, freedoms and interests of the parties involved.

19. It follows that, as the minority judges note, the two sets of revelations were indeed linked. They form a whole at the origin of the "*Lux Leaks*" case.

However, the revelations do not only derive their interest from this link with the first series of revelations. Indeed, it's hard to see, as the Luxembourg Court of Appeal does, that multinationals' tax returns are "merely unilateral statements of no interest". If this were the case, it would mean that the recent historic agreement at the EU level on Public

49. ECtHR (gr. ch.) 12 February 2008, *Guja / Moldova*, § 91. The ECtHR refers to *Barfod / Danemark* of 22 February 1989 (§ 29).
50. § 8 of the "*Halet*" judgment.
51. To such an extent that Quentin Van Enis speaks about "self-neutralization" ("Une solide protection des sources journalistiques et des lanceurs d'alerte: une impérieuse nécessité à l'ère dite de la 'post-vérité'?" in Y. Ninane (ed.), *Le secret*, Limal, Anthemis, 2017, Nr. 65).
52. The ECtHR sometimes suggests that the special protection established in the "*Guja*" case-law only applies to secret information that citizens have a "strong" interest in seeing disclosed or published (with this in mind, see ECtHR (gr. ch.) 12 February 2008, *Guja / Moldova*, § 74; ECtHR (2nd sect.) 19 January 2016, *Görmüş et al. / Turkey*, § 50). With this in mind, see J.P. Foegle, "Le lanceur d'alerte dans l'Union européenne: démocratie, management, vulnérabilité(s)" in M. Disant and D. Pollet-Panoussis (eds.), *Les lanceurs d'alerte. Quelle protection juridique? Quelles limites?*, Issy-les-Moulineaux, Lextenso, 2017, p. 118. With this in mind, see also Recital 5 of the Directive on whistleblowers which states that "common minimum standards ensuring that whistleblowers are protected effectively should apply as regards acts and policy areas where there is a need to strengthen enforcement, under-reporting by whistleblowers is a key factor affecting enforcement, and breaches of Union law can cause *serious* harm to the public interest"(our emphasis).
53. See namely ECtHR (3th sect.) 24 June 2014, *Von Hannover / Germany* (1), § 65. With this in mind, see A. Lachapelle, *La dénonciation à l'ère des lanceurs d'alerte fiscale*, *o.c.*, Nrs. 1126-1127.
54. § 66 of the "*Halet*" judgment.
55. § 3 of the "*Halet*" judgment.

Country-by-Country Reporting (PCbCR)[56] would in fact be meaningless. If the publication of a tax return is not likely to contribute to a public debate on a matter of general interest, why have Member States been negotiating since 2016 to oblige big multinational companies as well as big stand-alone companies[57] to make public the income tax information in each Member State, as well as in each non-cooperative jurisdiction?

20. Finally, if the ECtHR explicitly declares that it was sensitive to the detailed and contextual analysis provided by the national courts concerning the public interest, it must be noted that the assessment of the fifth criterion ultimately takes place *in abstracto*.

Indeed, the ECtHR supports the Luxembourg Court of Appeal's assessment of the fifth criterion in this respect. According to the Luxembourg judge, the fifth criterion does not require verification of whether the employer has concretely suffered damage and whether this damage is concretely superior to the public interest presented by the information revealed. That the Court should endorse such an assessment may come as a surprise since it emphasizes, in accordance with consistent case-law, that "the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".[58]

2. *Disclosed information must also be "vital, new and previously unknown"*

21. The whole reasoning of the national courts is based on the statement that "the documents provided by [the applicant] to the journalist did not (…) contribute to the public debate on Luxembourg's practice of [tax rulings], nor did they trigger [a] debate on tax evasion or provide vital, new and previously unknown information".[59]

While the applicant rightly sees in these three qualifiers new criteria to those established by the "*Guja*" case-law, the High Court sees "details which, in other circumstances, might prove too narrow, but which, in the present case, are used to conclude, together with the other data taken into account by the Court of Appeal, that the applicant's disclosures were not sufficiently relevant to weigh up the damage which it had recognized in the case of PwC".[60]

In any event, this reasoning seems to confirm a trend in the case-law of the ECtHR according to which this latter is sometimes no longer content to check, on the basis of Article 10 of the ECHR, that the information disclosed "is of public interest", but also that it is likely to "contribute to a public debate on a matter of general interest".[61] For instance, in the "*Leempoel*" case[62], the ECtHR stated that the offending article and its circulation[63] could not, "in the light of its content and the general context of the present case", "be regarded as having contributed to any debate of general interest to society", even though the article in question "was linked to a subject of general interest which was the subject of much debate".[64]

Such a development implies a tightening of the conditions under which the guarantees provided for in Article 10 of the ECHR are applicable.

This development is rightly intended to take account of the evolution of ICTs, which considerably facilitate the mass publication of information. Since the exercise of the right to freedom of expression is likely to be "easier" in the age of the Internet and social networks and since the effects of exercising this freedom are potentially more serious, the ECtHR may have wanted to add a criterion of "contribution to a public debate on a matter of general interest" in order to maintain a fair balance between the rights, freedoms and interests of the parties involved. Without this adjustment, the previously established balance was likely to shift.

However, the interpretation proposed by the Luxembourg judges and endorsed by the ECtHR is not without criticism.

22. With the dissenting judges, we cannot agree with the interpretation proposed here, which, instead of specifying the contours of the notion of "contribution to a public debate on a matter of general interest", increases the grey areas to the detriment of whistleblowers.

The three qualifiers do not provide "mere clarification" as the ECtHR suggests it. As soon as the Court acknowledges that these qualifiers "may lead to too narrow an assessment in certain cases", one wonders what circumstances other

56. Proposal for a directive of the European Parliament and of the amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, 12 April 2016, COM/2016/0198 final - 2016/0107 (COD). For an update of the progress of the work, see www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-taxation/file-public-country-by-country-reporting (last accessed on 1st November 2021).

57. Covered by the PCbCR are the multinational companies as well as the stand-alone companies with a total consolidated turnover of more than EUR 750 million in each of the last 2 consecutive financial years, regardless of whether they are headquartered in the EU or outside.

58. See ECtHR (gr. ch.) 8 November 2016, *Magyar Helsinki Bizottsag / Hungary*, § 121; ECtHR (plen.) 7 July 1989, *Soering / the United Kingdom*, § 87.

59. Read "les documents remis par [le requérant] au journaliste n'ont (…) ni contribué au débat public sur la pratique luxembourgeoise des [rescrits fiscaux] ni déclenché [un] débat sur l'évasion fiscale ou apporté une information essentielle, nouvelle et inconnue jusqu'alors" in the original version.

60. § 109 of the "*Halet*" judgment. In the original version: "des précisions qui, dans d'autres circonstances, pourraient se révéler trop étroites, mais qui, dans le cas d'espèce, sont utilisées pour conclure, avec les autres données prises en compte par la cour d'appel, que les divulgations du requérant ne présentaient pas un intérêt suffisant pour pondérer le dommage qu'elle avait reconnu dans le chef de PwC".

61. On this twofold approach, see Q. Van Enis, *La liberté de la presse à l'ère numérique*, Bruxelles, Larcier, 2015, Nrs. 106-133.

62. ECtHR (1st sect.) 9 November 2006, *Leempoel & S.A. ED. Ciné Revue / Belgium*.

63. In this case, the publication by the weekly magazine *Ciné Télé Revue* of an article containing lengthy extracts from the preparatory file that the investigating judge had handed over to the commission of inquiry set up in connection with an abduction Case (the "*Dutroux*" case).

64. In original version: the disclosed information "ne pouvaient, à la lumière de son contenu et du contexte général de la présente affaire", "être considérés comme ayant contribué à un quelconque débat d'intérêt général pour la société", and even if the offending article "se rattachait à un sujet d'intérêt général qui suscitait de nombreux débats". See § 72-82 of the Judgment in the "*Leempoel*" case.

than those of the present case could justify the application of the three qualifiers.

Apart from the fact that it dangerously opens the door to a degree of subjectivity on the part of the Member States, it is difficult to see what the "essential" or "vital" character adds to the public interest criterion. Could information relating to issues that do not attract the attention of the public authorities (for example, global warming during the *Trente Glorieuses* following the end of the Second World War) be qualified as "vital" according to such reasoning? The other two qualifications also have their share of criticism. Information can be old without being devoid of public interest as long as it is unknown, either to the public authorities or the public. Similarly, information can be known and still be of public interest if its disclosure reinforces or illustrates the seriousness of the problem reported and/or encourages the public authorities and/or civil society to tackle the problem reported head-on. This is especially true in the case of a problem as complex as the one in question. As noted by the dissenting judges, it seems difficult "to accept the vision of a public debate that is instantaneous or frozen in time. Citizens' attitudes on matters of public interest may be constantly evolving; in some cases, it takes decades of argument and counter-argument before public or private behavior actually changes".[65]

23. Moreover, it emerges from the ECtHR's case-law that the existence of a public debate on an issue of some importance – in this case, on the practice of tax rulings – might justify new disclosures of information in order to inform the debate in question.

Two decisions illustrate the issue. The first decision laid the first cornerstone of the judicial protection of whistleblowers and the second decision concerned, as in the present case, the publication of tax returns.

In the "*Guja*" case, the ECtHR noted that the facts denounced by the applicant were well known, i.e. they were already known by the public.[66] It then stressed that the letters disclosed by the applicant with "no doubt" concerned "very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate"[67] without verifying whether this information also contributed to a public debate on a matter of general interest.[68]

In the "*Fressoz and Roire*" case, the ECtHR concluded, certainly, that the offending article – i.e. the publication by the satirical weekly newspaper *Le Canard enchaîné* of information on the large pay increases of the chairman of the Peugeot company, one of the major French car manufacturers, during an industrial dispute widely reported in the press – "contributed to a public debate on a matter of general interest".[69] This conclusion is irrespective of the circumstance, as noted by the ECtHR, that the disclosed information might already have been known to a large number of people since "local taxpayers may consult a list of the people liable for tax in their municipality, with details of each taxpayer's taxable income and tax liability".[70] In addition, the remuneration of people who, like the Peugeot's chairman, run major companies is regularly published in financial reviews. The second applicant also indicated that he had referred to such a review to check the reliability of the tax returns he had received in accordance with the rules of the journalistic profession.

24. A final criticism can be made with regard to the Directive on whistleblowers. The Directive makes no provision for the reporting of "vital, new and unknown" information.

Reflecting the consensus reached between the 27 Member States, the Directive only requires that the applicant for protection must have 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".[71] There is not even a question of public interest, since this criterion is assumed to be met as soon as the violation reported consists of a violation of Union law as defined in Article 2.

In this regard, the ECtHR therefore seems to add additional conditions to those set out in the Directive which thus goes beyond what Member States have agreed upon.

3. The ECtHR exercises a marginal scrutiny while an EU directive has been adopted to protect the whistleblowers, including in the tax area

25. Beyond the discussions surrounding the notion of public interest, the nagging question is who is best placed to judge the public interest of a piece of information in relation to the right to freedom of expression. The national courts or the ECtHR? It cannot be ruled out that in a case such as the present one, the national courts might be tempted to minimize the importance of the documents stolen by the applicant in order to justify the application of dissuasive criminal sanctions.

In this case, the ECtHR is hiding behind the margin of appreciation left to the national courts in this matter. As it rightly

65. § 14 of the "*Halet*" judgment.
66. § 87 of the "*Halet*" judgment.
67. § 88 of the "*Guja*" judgment.
68. § 88 of the "*Halet*" judgment.
69. The publication of the paper took place "dans le cadre d'un conflit social, largement évoqué par la presse, au sein d'une des principales firmes automobiles françaises: les salariés revendiquaient des augmentations de salaires que la direction refusait. L'article démontrait que le dirigeant avait bénéficié d'importantes augmentations de salaires à l'époque, alors que parallèlement il s'opposait aux demandes d'augmentation de ses salariés" (ECtHR (gr. ch.) 21 January 1999, *Fressoz and Roire / France*, § 50).
70. ECtHR, "*Fressoz and Roire*" judgment, § 53.
71. Art. 6, 1. of the DWB. Moreover, Art. 6, 1. of the DWB stipulates that the whistleblower has to carry out this reporting in compliance with the procedure established pursuant to the DWB.

points out, there must be serious grounds for substituting its opinion for that of the domestic courts when the balancing by the national authorities has been carried out in accordance with the criteria established by the Court's case-law.[72]
However, it should also be recalled that "there is little scope under Article 10, 2. of the Convention for restrictions on political speech or on debate on matters of public interest".[73]
In a democratic system, "the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in *particular* information (our emphasis) can sometimes be so strong as to override even a legally imposed duty of confidence".[74]
Any restriction on freedom of expression must therefore be strictly assessed. As the minority judges point out, the examination of the fifth criterion involves a balancing of two types of interest of a general nature. The Court's reasoning is focused on the individual rights of the employer and those of the applicant. An essential stakeholder is overlooked: society. What about the public authorities?
In the present case, although it is true that neither the company concerned by the leak nor the multinationals whose tax returns were disclosed have any official function, an area in which the State's margin of appreciation would be smaller[75], the fact remains that they participate substantially in the tax system denounced both by the applicant and by civil society.[76] Moreover, it should be noted that the ECtHR held in the *Verlagsgruppe* judgment that, as a "business magnate […] who owns and manages one of the country's most prestigious enterprises", the applicant constitutes a "public figure" by virtue of his position within society.[77]
As a result, the margin of appreciation should, in our view, be reduced.
26. Furthermore, we believe that the legal framework currently in force, marked by the adoption of a European directive on the protection of whistleblowers, should lead to a narrowing of the margin of appreciation of the contracting states, at least concerning the Member States of the European Union. When it has to interpret a provision of the Convention in a specific case, in this case Article 10, the Court must take into account the existence of a common denominator among the contracting states in the light of the relevant international texts and state practice.[78]
It is all the more true that the Directive on whistleblowers makes the protection of whistleblowers subject to precise conditions, including neither the quality of the information nor the consideration of the damage suffered by the employer. By adding conditions to those set out in the Directive, national courts would exceed their margin of appreciation.

Conclusion

27. As the judgment has been referred to the Grand Chamber of the ECtHR, the lessons of this judgment cannot be set in stone – and fortunately some of them cannot.
Firstly, and this is a welcome observation, the applicant, Raphaël Halet, was recognized a priori as a whistleblower. Nonetheless, the applicant could not benefit from the whistleblowers' protection on the grounds that the harm suffered by the employer (PwC) in this case would outweigh the public interest in the disclosed documents. In the "Guja" case-law, however, this criterion is not predominant. Its assessment is formal as soon as the public interest in the disclosed information has been accepted, which is the case here. The criterion of the sanction imposed on the applicant also attracted the attention of the ECtHR, while the scrutiny of this criterion was classically quickly withdrawn. The ECtHR stated that the penalty would be proportionate and would not have a real "chilling effect".
Actually, the ECtHR's reasoning is based almost exclusively – even if implicitly – on the criterion of public interest which is also very rigorously analyzed. Indeed, the Court verifies whether the public interest of the disclosed information is "of a certain degree of seriousness" and whether the disclosed information "contributes to a public debate on a matter of general interest". It endorses the reasoning of the domestic courts, admitting that this criterion involves checking whether the information is "vital, new and previously unknown".
28. In the face of the criticism outlined above, it is to be hoped that the implementation of the Directive on Whistleblowers by the Member States and the expected judgment of the ECtHR, sitting as a Grand Chamber, will be able to give a glimmer of hope to those who use their right to freedom of expression to act in the public interest. More than ever, society will need these citizen watchdogs to face the many challenges of tomorrow – whether they are environmental, health, economic or digital.

72. ECtHR (gr. ch.) 7 February 2012, *Von Hannover / Germany*, § 107, CEDH 2012, § 96.
73. See ECtHR (gr. ch.) 8 July 1999, *Sürek / Turkey* (n° 1) [GC], § 61.
74. See ECtHR (2nd sect.) 19 January 2016, *Görmüş et al. / Turkey*, § 41; ECtHR (gr. ch.) 12 February 2008, *Guja / Moldova*, § 74; ECtHR (5th sect.) 21 July 2011, *Heinisch / Germany*, § 66.
75. See ECtHR (3th sect.) 24 June 2014, *Von Hannover / Germany* (1), § 63.
76. For a similar analysis, see ECtHR (2nd sect.) 26 April 2007, *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. / Portugal*, 26 April 2007, § 28.
77. ECtHR (5th sect.) 14 December 2006, *Verlagsgruppe News Gmbh / Austria* (n° 2), § 36. For a comment on this judgment, see A. Lachapelle, *La dénonciation à l'ère des lanceurs d'alerte fiscale*, *o.c.*, Nr. 1115.
78. With this in mind, see for example Cour eur. D.H. (gde ch.) 8 November 2016, judgment concerning *Magyar Helsinki Bizottsag / Hongrie*, § 124.