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When the public interest of the disclosed information is no longer enough for activating the safeguards derived from Article 10 of the European Convention on Human Rights

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Comment on the decision of the ECtHR in the case 'Halet against Luxembourg' ('Lux Leaks' case).

In a judgment delivered on 11 May 2021,[i] 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 clients of his employer, PricewaterhouseCoopers (PwC), does not violate his right to freedom of expression.

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. Nevertheless, they are so remarkable that they deserve to be highlighted. This case is also a reminder, if one were needed, that the field of taxation has fully entered the litigation of the ECtHR, especially from the angle of the right to privacy and the right to freedom of expression.

The 'Lux Leaks' case in short

At the material time, Raphaël Halet, a French national, was employed by PwC. Classified as one of the 'Big Four', which includes 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 rulings, also known as 'tax rulings', aim 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 part 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 quoted in the report.

On 5th June 2012, PwC filed a complaint with the Luxembourg Public Prosecutor's Office on

charges of theft, breach of professional secrecy and laundering and detention.

At the end of the domestic legal proceedings, Raphaël Hallet was denied whistleblower status. He then decided to bring the case to the ECtHR.

The applicant is indeed a 'whistleblower'

Before applying the criteria established by the 'Guja' case law, the ECtHR verifies whether the applicant can be recognized as a 'whistleblower'. This status is a condition of application of this case law.

Two elements are decisive. On the one hand, the existence of a **hierarchical bond** between the applicant and the person from whom 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'.[ii] It is agreed that this duty places the employee in a position of economic vulnerability about 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 transmitted to the French journalist were discovered and collected in the context of his employment relationship.

It should be noticed that the two criteria highlighted by the ECtHR – economic vulnerability and discovery in a work-related context – were partially[iii] endorsed by the European lawmaker in the Directive on whistleblowers. According to Article 5(7) of the Directive above mentioned, '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'.

In the light of these considerations, the ECtHR draws a parallel with the situation in which the applicants in the 'Guja' and 'Heinisch' 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.

Compliance with the fifth and the sixth criteria established by the 'Guja' case-law

Nonetheless, the applicant could not benefit from the whistleblowers' protection on the grounds that the **harm suffered by the employer** (PwC) in this case – resulting, in particular, from the damage to the firm's reputation and the loss of client confidence in its internal security arrangements – outweighed 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 it was usually quickly withdrawn in the Court's case law. The Court held that the penalty was proportionate in so far as the 'disinterested' nature of the applicant's action had taken into consideration to mitigate the fine imposed (1,000 euros). In so doing, the sanction imposed would

not, in the opinion of the Court, deter other potential whistleblowers and thus has not a real 'chilling effect'.

Disclosed information must be of public interest 'of a certain degree of seriousness'

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'.**

In practice, 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 Country-by-Country Reporting 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[iv] to make public the income tax information in each Member State, as well as in each non-cooperative jurisdiction?

Disclosed information also must 'contribute to a public debate on a matter of general interest'

Furthermore, the ECtHR assesses the criterion of public interest with regard to the notion of **'contribution to a public debate on a matter of general interest'.**

Accepting the interpretation of the Luxembourg Court of Appeal, the ECtHR considered that the public interest criterion might imply, in certain circumstances, investigating whether the information disclosed is **'vital, new and previously unknown'**.

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 recognised in the case of PwC'.[v]

In any event, this reasoning seems to confirm a trend in the case-law of the ECtHR according to which this latter sometimes no longer is content to check, 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 general interest'. For instance, in the 'Leempoel' case (64772/01), the ECtHR stated that the offending article and its circulation[vi] 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'.[vii]

Such a development implies tightening the conditions under which the guarantees provided 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 severe, the ECtHR may have wanted to add a criterion of 'contribution to a public debate on a matter of general interest' 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.

What is 'vital, new and previously unknown' information?

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', multiplies 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 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' 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 after the Second World War) be qualified as 'essential' 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 the 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 behaviour actually changes'.[viii]

Some information has already been protected under Article 10 of the ECHR without being 'new'

Moreover, it derived 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 ruling – may justify new disclosures of information in order to inform the debate in question.

Two decisions illustrate the issue. The first decision laid the first stone 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 (14277/04), the ECtHR noted that the facts denounced by the applicant were well known, i.e. they were already known by the public. It then stressed that the letters disclosed by the applicant without "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'[ix] without verifying whether this information also contributed to a public debate on a matter of general interest.

In the 'Fressoz et Roire' case (29183/95), the ECtHR concluded, certainly, that the offended 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'.[x] But right after, the ECtHR observed 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'.[xi] In addition, the remuneration of people who, like the Peugeot's chairman, run major companies are 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.

Conclusion

In the face of the criticism exposed 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 – be they climate, health, economic or digital.

[i] For a first comment of this judgment on this blog, see the comment of Jonathan Schwarz.

[ii] Para 91 of the Judgment.

[iii] Under Article 4 of the Directive on whistleblowers, a hierarchical bond is not needed. Recital 36 puts the focus on the position of economic vulnerability.

[iv] Are covered by the PCbCR 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 two consecutive financial years, regardless of whether they are headquartered in the EU or outside.

[v] Para 109 of the Judgment. In 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'.

[vi] 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)

[vii] In original version : 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 offended article ‘se rattachait à un sujet d’intérêt général qui suscitait de nombreux débats’. See Para. 72-82 of the Judgment in ‘Leempoel’ case.

[viii] In original version : it seems difficult ‘d’accepter la vision d’un débat public instantané ou figé dans le temps. L’attitude des citoyens sur les questions d’intérêt général peut être en constante évolution ; dans certains cas, il faut des décennies d’argumentation et de contre-argumentation avant qu’un comportement public ou privé ne change véritablement’.

[ix] Para 88 of the Judgment in ‘Guja’ case.

[x] Para 50 of the Judgment in ‘Fressoz et Roire’ case.

[xi] Para 53 of the Judgment in ‘Fressoz et Roire’ case.

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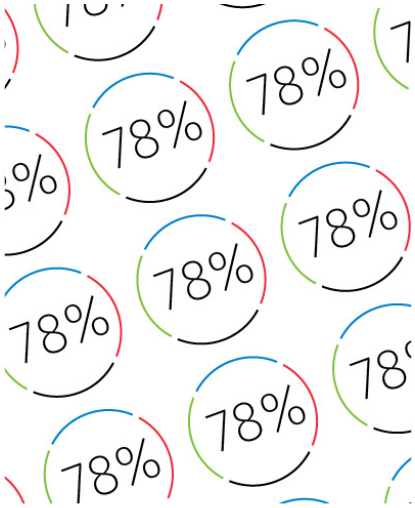

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