

European Court of Human Rights LuxLeaks Ruling: Harm to Business Outweighs Interest of Disclosure made by Whistleblower

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Introduction

Whistleblowing/speaking up/raising concerns is becoming more and more topical in Europe, notably with the implementation date for the EU whistleblowing regime drawing closer. We've made a film and we've written about those changes here <https://www.corderycompliance.com/eu-whistleblowing-faqs-2/>. A recent ruling by the European Court of Human Rights, Halet v. Luxembourg, concerning the right to freedom of expression has gone against the whistleblower in question – has this bucked the trend in protection for whistleblowers? This article sets out highlights of the ruling.

What's this all about?

The case concerns the so-called “LuxLeaks”. The LuxLeaks were financial revelations made in 2014 that were reported by investigative journalists based on leaks of confidential information coming from within PricewaterhouseCoopers (“PwC”) about so-called “tax rulings” and tax avoidance strategies concerning Luxembourg-based multinational companies.

Mr. R. Halet was one of two whistleblowers behind the LuxLeaks revelations. In 2012, whilst a PwC employee, he disclosed PwC internal company documents (that he had obtained in the context of his employment relationship) to a journalist which were then published in the media – it is important to note that this disclosure came *after* the disclosure made by the first whistleblower. The published information highlighted a practice, over the period of 2002-2012, of highly advantageous tax agreements made between PwC, acting on behalf of multinational companies, and the Luxembourg tax authorities.

As a result of making this disclosure, Mr. Halet, having been identified by PwC which then dismissed him, was prosecuted in 2016 in Luxembourg on several charges, including breach of professional secrecy. The Luxembourg District court ruled that Mr. Halet could not be protected as a whistleblower under Article 10 of the European Convention on Human Rights (“the Convention”) because the seriousness of the offences in question outweighed the public interest in the information disclosed. Mr. Halet was convicted and sentenced to a nine-month prison sentence (suspended) and ordered to pay a €1,000 fine and €1 in non-material damages to PwC. His conviction was upheld before the Luxembourg Court of Appeal and then consequently by the Luxembourg Court of Cassation. Mr. Halet then took his case to the European Court of Human Rights.

What was the court's ruling?

The court ruled as follows:

- In a line of case law starting in 2008 (*Guja v. Moldova*), the European Court of Human Rights has established that, in the framework of the right to freedom of expression, employees may be protected under the Convention when whistleblowing, and has set out six criteria that need to be considered: (i) the public interest in the disclosed information; (ii) the authenticity of the information; (iii) the reporting channel used; (iv) the good faith of the employee; (v) the harm suffered by the employer; and, (vi) the severity of the sanction imposed;
- In a 2011 case (*Heinisch v. Germany*), the European Court of Human Rights also ruled that, in whistleblowing situations, companies have the right to protect their commercial interests and reputation, i.e. an employee's right to freedom of expression in speaking up about wrongdoing has to be weighed against a company's right to protect its commercial interests and reputation;
- According to the court, the first four of the above-mentioned criteria were not in dispute, i.e.: the disclosures had been of public interest; the information disclosed had been true; informing the public through the media had been the only realistic means of alerting them; and, Mr. Halet had acted in good faith. Disagreement

concerned the fifth and sixth criteria, i.e. 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;

- As regards the fifth criteria, according to the court, Mr. Halet's right to protection of his freedom of expression was in conflict with the right of his employer to protect its reputation. The Luxembourg courts had ruled that the fifth criterion was not satisfied since the disclosure by Mr. Halet of documents that were subject to professional secrecy had caused harm to PwC, which resulted in particular, from the damage to the firm's reputation and the loss of client confidence in its internal security arrangements, which outweighed the general interest. In balancing the interests at stake, the Luxembourg courts had thus attributed greater weight to the harm suffered by PwC than to the interest of the disclosures made by Mr. Halet;
- According to the court, although PwC had suffered harm owing to the very fact of the widely reported controversy arising out of the LuxLeaks affair, the firm had subsequently seen an increase in turnover coupled with a significant rise in staff numbers. So, it had to be ascertained whether the damage to its reputation had been real and tangible. PwC's financial fortunes did not appear to have suffered lasting harm and there was every indication that its reputation had not ultimately been compromised, at least not among the companies that made up its client base. So, while PwC had undoubtedly suffered harm in the short term, no longer-term damage to its reputation had been established;
- According to the court, the Luxembourg Court of Appeal had given detailed reasons for its findings regarding the fifth criterion established by the Guja case-law. Accordingly, the court would require strong reasons to substitute its own view for that of the Luxembourg courts, but, the court concluded that this situation did not apply in Mr. Halet's case for a number of reasons;
- According to the court, the Luxembourg Court of Appeal had assessed the interest of Mr. Halet's disclosures with care, examining in depth their content and their repercussions in terms of multinational companies' tax practices. In that context, the Luxembourg Court of Appeal had acknowledged that the disclosures were of general interest. It had even taken into consideration the impact of the information, accepting that it was liable to "concern and shock people". The Luxembourg Court of Appeal had nevertheless held that the interest of Mr. Halet's disclosures weighed less heavily than the harm suffered by PwC, after finding that those disclosures had been of limited relevance. In reaching that conclusion, the Luxembourg Court of Appeal observed that the documents had not provided any information that was "vital, new or previously unknown". The Luxembourg Court of Appeal had not added any new criteria to those established by the case law of the European Court of Human Rights. On the contrary, the three qualifiers ("vital, new and previously unknown") were encompassed in the Luxembourg Court of Appeal's exhaustive reasoning on the balancing of the private and public interests at stake. Whilst in other circumstances these terms might be considered too narrow, in Mr. Halet's case they had served, together with the other elements taken into account by the Luxembourg Court of Appeal, to found the conclusion that Mr. Halet's disclosures had lacked sufficient interest to counterbalance the harm suffered by PwC; and,
- As regards the sixth criteria, according to the court, the Luxembourg courts had taken into consideration, as a mitigating factor, the "disinterested nature of [Mr. Halet's] actions" and had therefore imposed a fairly modest fine (€1,000). This could reasonably be regarded as a relatively mild penalty that would not have a real chilling effect on the exercise of Mr. Halet's freedom or that of other employees, while encouraging those concerned to consider the legitimacy of their intended actions. In sum, regard being had to the margin of appreciation that Contracting States have under the Convention, the Luxembourg courts had struck a fair balance in Mr. Halet's case between the need to protect the rights of Mr. Halet's employer on the one hand and the need to protect Mr. Halet's freedom of expression on the other.

What are the takeaways?

The effect of the court's ruling would seem to weaken protection and incentive for whistleblowers (and has been criticised for this accordingly), also apparently going against the legislative trend to offer more protection for whistleblowers. However, the case has now been sent to the Grand Chamber of the European Court of Human Rights so there will be reconsideration and a further ruling on this matter, which may conceivably go in a different direction. It should be noted in this regard that in the Halet ruling two of the judges dissented against the majority's ruling arguing that the majority's ruling has taken a wrong turn from the 2008 Guja case.

Compliance teams should also stay on course preparing for the EU whistleblowing regime, including consideration

of the following:

1. Reviewing whistleblower policies, internal procedures, and communications with employees and others about whistleblowing;
2. Choosing helpline providers carefully;
3. Factoring in a multitude of data protection considerations; and,
4. Training staff.

Resources

We have made a film and written about the EU whistleblowing rules which can be found here <https://www.corderycompliance.com/eu-whistleblowing-faqs-2/>.

We have written about whistleblowing/speaking up/raising concerns in the UK which can be found here <https://www.corderycompliance.com/uk-whistleblowing-speaking-up/>.

The European Court of Human Rights' judgment can be found here (in French) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-209869%22%5D%7D>.

We write about modern slavery/ESG/supply chain due diligence and compliance issues here <https://www.corderycompliance.com/category/modern-slavery-supply-chain-management/>.

We write about privacy/data protection issues here <https://www.corderycompliance.com/category/data-protection-privacy/>.

We write about anti-bribery and corruption issues here <https://www.corderycompliance.com/category/bribery-corruption/>.

For more information please contact André Bywater or Jonathan Armstrong who are lawyers with Cordery in London where their focus is on compliance issues.

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