

## **LU: Luxembourg's Court of Cassation reasserts whistleblower protection in the LuxLeaks case**

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On 11 January 2018 Luxembourg's Court of Cassation delivered its judgement in the "LuxLeaks"-case<sup>1</sup> concerning the largescale leaking of confidential documents by two former PwC employees, Antoine Deltour and Raphaël Halet, to a journalist, Edouard Perrin, revealing tax deals concluded between Luxembourgish authorities and multinational companies, facilitated by consultancy firm PwC. The Cassation appeal is however not a full review. Only the correct application of the law is verified, the facts are not re-examined.

After all three men's sentencing in first instance, the journalist Perrin was acquitted on appeal based on the 'responsible journalism' justification, derived from Article 10 ECHR freedom of expression jurisprudence.<sup>2</sup> The two former PwC employees however, though given lower sentences, were still condemned on appeal,<sup>3</sup> both consequently filing appeals with Luxembourg's Court of Cassation.

Concerning Deltour, the Court of Cassation ruled that the Court of Appeal violated Article 10 ECHR by not applying the 'whistleblower' justification to all incriminating facts which together in context led to the revelation of the confidential documents, altogether constituting the act of whistleblowing. It therefore wrongfully separated the moments of document transfer from Deltour to Perrin, and of document theft, admitting Deltour fulfilled all six jurisprudential conditions for benefitting from whistleblower protection for the former, while refusing this protection for the latter by imposing an additional requirement of having the intention of publishing the documents in that moment. The Court of Appeal thereby went beyond the conditions set in ECtHR jurisprudence for benefitting from whistleblower protection.

Nevertheless, the Court of Cassation stressed the need for another referral back to the Court of Appeal so as to examine the sanction Deltour may incur for the removal of the advanced training documents from PwC which were not in the public interest, since whistleblower protection cannot justify their taking.

Concerning Halet, the Court of Cassation found his appeal to be without merit in its entirety. Unable to re-examine the facts, the Court of Cassation found that the Court of Appeal did not violate Article 10 ECHR: it sufficiently motivated its finding that Halet's revelations did not meet the condition of proportionality. By revealing those specific confidential documents, he disproportionately harmed his former employer PwC. Having exhausted local remedies, Halet confirmed that he would apply to the European Court of Human Rights seeking review of the Art. 10-conditions for whistleblowers by the ECtHR.<sup>4</sup>

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<sup>1</sup> 'Arrêt de la Cour de cassation concernant le pourvoi de Mr Antoine Deltour/ « LuxLeaks »' (La Justice, Grand-Duché de Luxembourg, 11/01/2018) <<http://www.justice.public.lu/fr/actualites/2018/01/arret-3912-cassation--deltour/index.html>>.

'Arrêt de la Cour de cassation concernant le pourvoi de Mr Raphaël Halet/ « LuxLeaks »' (La Justice, Grand-Duché de Luxembourg, 11/01/2018) <<http://www.justice.public.lu/fr/actualites/2018/01/arret-n-3911-cassation-halet/index.html>>.

<sup>2</sup> Perrin is currently involved in a separate procedure for the retraction of the search and seizure order granted to PwC by the French judge in 2014 permitting the search of Halet's home, alleging it violated the protection of journalistic sources. His request was rejected on 6 February 2018, but Perrin stated he will appeal. For more information see: <https://www.wort.lu/fr/economie/luxleaks-pwc-remporte-une-bataille-contre-le-journaliste-5a79c5bfc1097cee25b7d0f6>.

<sup>3</sup> For more information see: <https://ecpmf.eu/news/legal/reduced-sentences-in-luxleaks-trial-after-application-of-echr-case-law>.

<sup>4</sup> Jean-Baptiste Chastand, 'LuxLeaks : la condamnation d'un des lanceurs d'alerte français annulée en cassation' (Le Monde, 11/01/2018) <[http://www.lemonde.fr/evasion-fiscale/article/2018/01/11/luxleaks-la-condamnation-d-un-des-lanceurs-d-alerte-francais-annulee-en-cassation-au-luxembourg\\_5240227\\_4862750.html](http://www.lemonde.fr/evasion-fiscale/article/2018/01/11/luxleaks-la-condamnation-d-un-des-lanceurs-d-alerte-francais-annulee-en-cassation-au-luxembourg_5240227_4862750.html)>.