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The LuxLeaks Case: Summary Translation of the Court of Appeal Judgement of 15 March 2017

The following overview is a summary translation of the judgement of the Court of Appeal of Luxembourg in the so-called LuxLeaks case.[1]
The case originated in the complaint made to the Luxembourgish police authorities against Antoine Deltour and Raphaël Halet by the audit company PricewaterhouseCoopers (hereinafter 'PwC') after discovering that they had leaked confidential documents, including advanced tax agreements and tax declarations of large multinational companies, to a journalist, Edouard Perrin. Perrin himself was later charged as an accomplice by the Luxembourgish Public Prosecutor's Office. The case appeared in first instance before the District Court of Luxembourg in May 2016, a verdict was reached on 29 June 2016. Therefore, in the appeals judgment first the original District Court judgement is summarised. Then after discussing the procedural history and the facts, the different arguments of all the parties to the case were considered. In addition to this translation which follows the Court's judgement in structure,[2] a summary of the court case in first instance and of the first instance judgement can be found at ECPMF.[3]

[1] Arrêt de la Cour d'appel dans le cadre de l'affaire dite "LuxLeaks" du 15/03/2017 (La Justice, Grand Duché de Luxembourg, 15/03/2016) <http://www.justice.public.lu/fr/actualites/2017/03/arret-luxleaks-cour-appel/index.html>.
[2] Titles and numbering have been inserted by the author in order to improve workability of the document.
[3] Annelies Vandendriessche, 'Luxemburg : The LuxLeaks Trial' (ECPMF.eu, 09/08/2016) <https://ecpmf.eu/news/legal/archive/luxemburg-the-luxleaks-trial>.
Annelies Vandendriessche, 'Luxemburg : Whistleblowers condemned in LuxLeaks Trial, Journalist Acquitted' (ECPMF.eu, 09/09/2016) <https://ecpmf.eu/news/legal/archive/luxemburg-whistleblowers-condemned-in-luxleaks-trial-journalist-acquitted>.

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1. Findings of the District Court of Luxembourg in First Instance

Sentences in first instance by verdict of 29 June 2016 of the District Court of Luxembourg (*'Tribunal d'arrondissement de Luxembourg')*[4]:

- Edouard Perrin, the journalist, was acquitted of all charges against him
- Halet was condemned to a suspended prison sentence of 9 months and the payment of 1000 euros fine and the charges of his criminal prosecution, as well as the payment of a symbolic euro in damages to PwC
- Deltour was condemned to a suspended prison sentence of 12 months and the payment of a 1500 euros fine and the charges of his criminal prosecution, as well as the payment of a symbolic euro in damages to PwC.

Halet filed for appeal on 29 June 2016.
Deltour filed for appeal on 28 July 2016.
The Public Prosecution filed for a general appeal on 29 July 2016 so that the case against all three defendants would be re-examined in its entirety.

2. The Trial before the Court of Appeal

Public hearings were held on 12, 19 and 21 December 2016 before the Court of Appeal of Luxembourg, 10th Chamber, correctional matters.

The Hearing of 12 December 2016, were heard:
- The lawyers for the defense
- the Public Prosecution
- the civil party to the proceedings: PwC
- the defendants Deltour and Halet.

The Hearing of 19 December 2016, debates continued, were heard:
- pleading by the Public Prosecution

The Hearing of 21 December 2016, were heard:
- the civil party to the proceedings: PwC
- the pleadings of the two lawyers of Deltour: Philippe Penning and William Bourdon

The Hearing of 4 January 2016, were heard:
- the pleadings of the two lawyers of Halet: Bernard Colin and May Nalepa
- the pleadings of the two lawyers of Perrin: Christel Henon and Olivier Chappuis

The Hearing of 9 January 2017, were heard:
- the Public Prosecution, rebuttal
- re-rebuttals by the lawyers of the 3 defendants, Deltour, Halet and Perrin
- Deltour, Halet and Perrin given the final word

The Court deliberated, and reached its verdict on 15 March 2017.

[4] Jugement dans le cadre de l'affaire dite "LuxLeaks" du 29/06/2016 (La Justice, Grand-Duché de Luxembourg, 30/06/2016) <http://www.justice.public.lu/fr/actualites/2016/06/jugement-affaire-luxleaks/index.html>.

3. The Judgement of the Court of Appeal

The Court of Appeal proceeded by first recalling the facts of the case, then considered the defense's request to hear the testimony of Marius Kohl, head of the Tax Administration at the time of signing the controversial advanced tax agreements, it later considered how whistleblower protection and Article 10 of the European Convention on the Protection of Human Rights could be integrated into Luxembourgish law. Subsequently, the Court proceeded by establishing the perpetrated infractions, followed by the consideration for possible justifications for perpetrating the infractions. Finally, the Court pronounced itself on the criminal and civil sanctions for the defendants.

a. Facts of the Case

On 4 April 2012, during an interview for the TV-show C*ash investigation* on France 2 the head of PwC's tax department discovered that an advanced tax agreement (hereinafter 'ATA'), a confidential document prepared by PwC and signed by the Luxembourgish tax authorities, found its way into the hands of the journalist.
By the end of April 2012 tens of multinational companies (hereinafter 'MNCs'), clients of PwC, were contacted by the BBC concerning their tax structures and company structures in Luxembourg, put in place with the help of PwC.
During another episode of the tv-show *Cash investigation* on 11 May 2012 journalists mentioned 47 000 pages of documents of PwC obtained from an anonymous source, including ATAs and confirmation letters signed by the Luxembourgish tax authorities, more precisely by Marius Kohl. 24 clients of PwC and the company law structures put in place to allow for tax optimisation were mentioned in detail. Also in the British TV-shows *Panorama* and *Private Eye*, confidential ATAs with PwC letterhead were thoroughly commented on.
Internal investigation by PwC revealed that the documents originated from an internal leak. It revealed that access to these ATAs was restricted to a limited number of people, but that due to a specific Microsoft Windows feature a large number of auditors could unknowingly have access to these documents.
PwC filed a complaint with Luxembourg's Public Prosecutor's Office for theft, violation of professional secrecy and laundering-possession of stolen material.

In a new tv-episode of *Cash investigation* in June 2013, again confidential documents of PwC were discussed, this time confidential tax declarations of large MNCs, not originating from the original leak by Antoine Deltour.

On 5 & 6 November the ICIJ published online 28 000 pages of confidential PwC documents, including 538 ATAs taken by Antoine Deltour and 14 tax declarations of large MNCs taken by Raphaël Halet. Research by the ICIJ brought to light the advantageous tax agreements concluded between PwC and the Luxembourgish fiscal authorities, through mechanisms and constructions allowing revenue to be transferred from one branch of a company to another, resulting in a much lower tax rate than the legal tax rate. This leak is what led to what is now known as the *Luxleaks* scandal.
Antoine Deltour, auditor for PwC, was identified as having copied on October 13th 2012, training documents as well as 554 files, of which 537 were ATAs, some of which were portrayed on television. He was charged by the investigative judge on 12 December 2014.
He admits the material circumstances: he declares having copied, using the server of his employer, over 45 000 pages of confidential documents onto his professional laptop to then

recopy them onto his personal computer's hard drive. He acknowledges having given a copy of the whole of his documentation to the journalist Perrin, so that it could be published, so that things would change for the better.
Halet admits to having copied the tax declarations in order to transfer them to the journalist Perrin, in order to support his journalistic investigation and revelations made in the media. Halet was charged by the investigative judge on 23 January 2015.

Perrin admits to having as an investigative journalist while working on a documentary concerning tax evasion, contacted Antoine Deltour, after a comment he made on a website concerning tax optimisation. He admits to having received all of the documents Deltour copied, and to having analysed, used and exhibited them partly during the course of his show *Cash investigation*. Halet however contacted him on his own initiative proposing to hand him documents to support his work. He confirms that he recommended that Halet use the dead mailbox technique for the transfer of the documents, and using this method he received the 14 tax declarations Halet copied from PwC. Perrin was charged as an accomplice by the investigative judge on 23 April 2015.

All three defendants contest having forwarded the documents to the ICIJ.

b. The Reasoning of the Court

In its judgement the following points were considered by the Court:

1) The lacking testimonial of Marius Kohl, just as in first instance, declared sick by medical certificate for a period covering all hearings

The lawyers of Raphaël Halet wished to hear the testimony of Marius Kohl, who approved the ATA requests submitted to the Luxembourgish tax authorities in order to question him about the administrative functioning behind the ATAs, so that the defense could establish the illegality of these practices and thereby the illegality of the practices denounced by Halet. They consider the medical certificate to be false, and request the nomination of a doctor by the Court, so that he can provide a second opinion. The testimony of Marius Kohl would be necessary and useful to safeguard the rights of the defense in accordance with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly referred to as the European Convention on Human Rights (hereinafter 'ECHR'). This request is supported by the lawyers of Edouard Perrin, whereas the lawyers of Antoine Deltour revert to the wisdom of the Court concerning this matter.
The Court acknowledges that Halet may have a personal interest in the testimony of Marius Kohl, despite the fact that he only revealed information on tax declarations and not on the ATAs, since the revealing of 14 tax declarations can be seen in the context of the tax law practices favouring MNCs that were originally denounced by Antoine Deltour.

The Court however did not find this request well-founded, and considered the hearing of Marius Kohl to be unnecessary for 5 reasons:

1. The legality of the practice is not a necessary criterion for the application of the status of whistleblower according to the jurisprudence of the European Court of Human Rights (hereinafter 'ECtHR'), the disclosure can concern "dysfunction" or "questionable practices".

    - Even when considering the public interest of the disclosure and its proportionality the ECtHR does not consider the legality of the disclosed act, but rather takes into account the damage caused by it.
2. The facts the defense wishes to establish through the testimony of Marius Kohl, are not opposed by any of the parties to this dispute.
3. Marius Kohl if heard, would only be able to pronounce himself on material facts, not on the legality of the practices
4. This Court will also not pronounce itself on the legality of an individual administrative decision, or on the legality of an administrative practice, since this is not within its competence (competence of administrative courts)
5. Material evidence, decisions and documentation provide the same information a testimony by Marius Kohl would.

The Court therefore did not appoint a doctor to evaluate Marius Kohl's physical capability to appear in Court.

2) The Status of Whistleblower in Luxembourgish Law

The Court contemplated first how the protection of whistleblower could be integrated into Luxembourgish criminal law.
The defendants Antoine Deltour and Raphaël Halet rely above all on Article 10 ECHR, as interpreted by the European Court of Human Rights (hereinafter 'ECtHR'), and ask that in application of Article 10 their status as "whistleblower" be recognised and that their acquittal be pronounced on that legal basis.
Edouard Perrin asks for his acquittal, and as subsidiary means asks for his acquittal on the basis of Article 10 ECHR.
The Public Prosecution held that the status of whistleblower according to the ECtHR entails an immunity from judicial prosecution and criminal sentencing under certain conditions, in application of the principle that for state intervention with the freedom of expression to be legal it must be "necessary in a democratic society". In Luxembourgish law, the status of whistleblower would hence constitute a justification, neutralising the legal element of the infraction, resulting in the acquittal of the defendant. The conditions for application of this status are cumulative, if all conditions are not fulfilled, this could however result according to Luxembourgish law in the application of extenuating circumstances (*'circonstances atténuantes'*), with an impact on the determination of the severity of the criminal sentence.

The status of whistleblower in Luxembourgish law is recognised by two instruments, though a definition and precise criteria for its application are lacking:

- Article L.271-1 of the Labour Code
    - Limited to protecting against reprisals those employees refusing to cooperate to, or who expose facts that could constitute the infraction of bribery or traffic of influence (*"prise illégale d'intérêt, de corruption ou de traffic d'influence")*
- Article 38-12 of the Law of 5 May 1993 on the financial sector
    - Limited to employees exposing violations or potential violations of EU Regulation 575/2013, of the Law of 5 May 1993 on the financial sector and of its implementing measures

Although the hierarchy between international and national norms is not explicit in Luxembourgish law, Luxembourgish courts may proceed to a control of conventionality, which could lead to the prioritising of the international norm of direct application over the national norm, be it an earlier or later national norm. Luxembourgish courts will take into consideration and apply the ECHR, as well as its interpretation by the ECtHR, to the present case, based on

Articles 1 and 32 ECHR requiring that the rights guaranteed in by the ECHR be effective and concrete.

3) Article 10 ECHR

Jurisprudence of the ECtHR regularly emphasises that a violation of Article 10 lies in the chilling effect of sanctions on the use of the freedom of expression, particularly when a whistleblower could face criminal prosecution.
Since the Convention does not prescribe exactly how to shape in national law the enjoyment of the fundamental rights and freedoms contained in it, it is up to the Member States to determine how to give the Convention an effictive application.

The lawyers of Deltour and Halet emphasise that they do not wish to invoke Article 10 as a justification, neutralising the legal element of the infraction.

- They request the Court to verify whether the restriction of their right to freedom of expression and to communicate information was necessary in a democratic society
    - According to the Court of Appeal however, neither the ECHR nor Luxembourgish law provide the whistleblower with immunity against criminal prosecution, nor with a cause for non-liability in criminal law, or with an exempting or an absolutory cause (a *cause absolutoire* or a *cause de non-imputabilité)*
        - Though through Article 10 ECHR it can be established whether or not the criminal prosecution was necessary in a democratic society, it does not allow the simple acquittal of the accused of an infraction of criminal law of which all the constituting elements have been legally established.
        - Lacking any more specialised text in this field of law, the Court of Appeal will only pronounce the acquittal of the accused based on an exempting cause, on a justification, on a cause of non-responsibility, or based on an absolutory cause ("*cause de non-imputabilité*, justification, *cause d'irresponsabilité*, *ou cause absolutoire"*)

According to the Court, justifications either have a legal or jurisprudential basis

- When a legal or regulatory basis for such a justification is lacking, a *sui generis* justification is sometimes developed through jurisprudence, in order to absolve actions which would normally constitute an infraction
    - This can only happen under 4 circumstances:
        - **when there is a conflict of laws** - meaning that the legislator cannot punish those acts required or permitted by other legal instruments that are still in application
        - **when the derogation is motivated by the social utility of the action**
        - **when the action is inherently legitimate**
        - **when a strict application of the law is inadequate or inappropriate**
    - an example of such a sui generis justification developed by jurisprudence is the 'state of necessity'

Article 10 ECHR, provides that the exercise of the freedom of expression but also the freedom to receive and impart information can only be subject to conditions, restrictions and sanctions if provided by law and necessary in a democratic society for the protection of the reputation and rights of others, to prevent the revelation of confidential information or to guarantee the authority and impartiality of the judiciary.

- According to the Court of Appeal the exercise of this freedom should not be hampered by internal national legislation, meaning that in a debate on a matter of general interest concerning tax evasion, the freedom of expression of the whistleblower can under certain conditions prevail and be invoked as a justification for a violation of national legislation
    - The justification of the status of whistleblower will hence neutralise the illegality of the violation of the law, under the condition that the violation was committed in good faith and in a proportionate and adequate manner, to reveal information of general interest
        - Since a justification neutralises the legal element of the infraction, leading to the acquittal of the defendant, it is necessary first to determine whether the facts the defendants are accused of constitute criminal infractions.

4) Determination of the Infractions

In determining whether the material facts constitute infractions of the Criminal Code, the Court of Appeal, considered all three defendants separately: (i) Antoine Deltour, (ii) Raphaël Halet and (iii) Edouard Perrin.

i. Antoine Deltour

1. **Domestic theft (Article 464 Criminal Code)**
    a. The court in first instance held Deltour guilty of domestic theft for the copying onto his professional computer of documents stored electronically on the PwC servers, to later copy the files onto his personal computer, knowing that he did not have the right to do so
        i. The court's reasoning was based on jurisprudence of the Court of Cassation of 3 April 2014 which held that electronic data stored on a server, although an immaterial good, falls within the material scope of application of theft (Article 461 Criminal Code)
            1. The defense contests that an immaterial good can be stolen, and holds that a "good" as understood under Article 461 of the Criminal Code can only be a material good, they deem the introduction of the expression "electronic key" into Article 461 as a consequence of the implementation into Luxembourgish law of the European Council Convention on Cybercrime of 2014 to support the idea that immaterial goods were prior to this excluded from the scope
                a. The public prosecution contests this, saying that electronic data, in fact has a certain material presence and must be considered a "good" within the meaning of Article 461
    b. According to the Court of Appeal electronic data, is not information in a strict sense, but exists in the form of a sequence of numbers, in electronic form, translated by a software, which allows for the performance of certain tasks. Electronic data can be registered, transmitted or reproduced in the form of impulses sent through electronic circuits, on tapes, magnetic disks or usb sticks, on which the delivery can be established in a material sense

i. Electronic data is not completely immaterial, it can be taken by extracting it from the automated data processing system
    1. According to the Court of Appeal the jurisprudence of the Court of Cassation therefore remains valid, and electronic data stored on an employer's server are therefore legally the exclusive property of the owner of the server and constitute goods which can be taken by means of download or transfer
        a. A person having accessed and maintained himself within an automated data processing system taking from it electronic data and saving it onto his own electronic storage system without the consent of the owner is therefore guilty of theft
            i. The fact that the owner does not lose possession of the data is irrelevant from the moment that his will was not respected
            ii. criminal intent may be established from the moment that the author was aware that the stolen good was not his property
            iii. *dol général* (similar to what is understood as "basic intent") may be established by the fact that the author was conscious of the fact that saving the data happened without the right to do so
            iv. *dol spécial* (similar to what is understood as "specific intent") may be established when the author of the action of appropriation of data, behaves as the rightful owner of the data
            v. According to the Court of Appeal the motive is irrelevant for the characterisation of the action as an infraction

c. According to the Court of Appeal by accessing and maintaining himself in the data system of PwC and extracting and downloading from it, without the consent of the owner, training documents as well as the ATAs in the form of electronic data stored on PwC's servers, to save it onto the hard drive of his personal computer, Deltour appropriated a good belonging to someone else.
    i. Deltour claims having had the right to save the training documents, but PwC contests this based on his employee contract
        1. Deltour never supported with proof his claims that there existed a tolerance as to the saving of these types of documents, they therefore remain pure allegations
    ii. The appropriation of documents further took place the eve of the end of his employee relationship with PwC at the premises of PwC itself, at Deltour's habitual workplace
        1. The aggravating circumstance of domesticity is thereby fulfilled
        2. The Court thereby confirms the judgement in first instance on the matter of domestic theft, and retains the charge of domestic theft against Deltour.

2. **Informational fraud (Article 509-1 Criminal Code)**
    a. The charge of fraudulent accessing and maintaining oneself within an automated data processing system was held against Deltour in first instance
        i. The defense requests acquittal on this charge on the basis that this supposes a forced entry into the system, whereas Deltour was authorised to access the system, and then remained voluntarily within another part of the system
            1. Deltour, given his work as auditor had a free access to certain parts of the system of PwC, a particularity of Microsoft Windows however allowed him free access to the ATAs, to which access was normally restricted for him
    b. The Court however emphasised that the material element of the infraction is constituted by either the fraudulent access or the fraudulent maintaining of oneself in the system, either one is sufficient
        i. Having an authorised access into the system does not automatically imply that it is legitimate to maintain oneself in that system, also an employee performing actions within that system which fall outside his mission is to be considered fraudulent
            1. By downloading the ATAs Deltour exceeded his authorisation of access to the system, his continued presence in the system in order to access the ATAs therefore constitutes fraud in the meaning of Article 509-1 Criminal Code

3. **Violation of trade secrets**
    a. In first instance the Court held that knowledge of the tax law and company law constructions of MNCs facilitating tax optimisation in Luxembourg was restricted to a small group of people having an interest in keeping these practices secret. The intentional revelation by Deltour of these constructions to the journalist with the intent to harm his employer caused significant harm to PwC. The charge was therefore held against Deltour.
        i. The Court of Appeal however emphasised that for a violation of trade secrets to take place a revelation of a secret known only by a limited number of people and difficult to acquire knowledge of for third persons, must happen in order to achieve one of the aims foreseen by the law
            1. The revelation must be made with malicious intent towards the employer, or be made in a context of gaining a competitive advantage or an illicit benefit from it
                a. According to the Court Deltour does not fulfill these conditions, since the facts indicate that Deltour when transferring the documents to the journalist did not wish to harm his employer but acted out of conviction and had specifically requested that the journalist would not reveal the name of the company and of its clients. Only when the journalist insisted, these names were revealed. Deltour also did not receive any kind of remuneration for his revelations.
                    i. For these reasons the charge of violation of trade secrets can not be held against Deltour

4. **Violation of professional secrecy (Article 458 Criminal Code)**
    a. In first instance the court held that the revelations made by Deltour concerning the tax structures were only known by a limited amount of persons having an interest in keeping this secret, and that his revelations were made with the intention of harming his employer PwC
        i. The defense and Public Prosecution are now however in agreement that the revelations made by Deltour had no intention of harming his former employer PwC
    b. With regard to the violation of professional secrecy Deltour is accused of having communicated the ATAs to Perrin
        i. From the hearings it can be seen that Deltour did not have any malicious intentions towards his employer but acted out of conviction, and wanted to allow Perrin the possibility of preparing a documentary on tax optimisation and the systemic practice of ATAs in Luxembourg in order to provoke public debate on this issue
            1. Deltour also at first did not wish the name of his former employer or its clients to be mentioned, the journalist however insisted
            2. He also made no profit from his revelations
        ii. Deltour admits having been subject to the obligation of professional secrecy and to the material aspects of the facts, but asks the Court to take into consideration that the professional secrecy protects the clients of PwC, and not PwC itself, and that no clients brought charges on these grounds. He also contests the secrecy of the ATAs since they can be verified in the Registre de commerce et des sociétés
            1. The Court established that Deltour was subject to professional secrecy: the Law on the Profession of Auditor requires all professionals to keep secret the information confided in them during the exercise of their profession, Deltour's contract contained a confidentiality clause, and since Article 458 on the obligation to professional secrecy is a public policy provision ("*disposition impérative et d'ordre public"),* it is therefore not required that the clients bring charges in order for Article 458 to apply to the facts at hand
                a. The secret nature of the ATAs is demonstrated by the fact that only a very limited number of people had access to them within PwC
                b. The obligation of professional secrecy also remains after leaving his functions, so at the moment of transfer of the documents to Perrin by Deltour, this obligation still applied
                c. Further, this transfer happened intentionally, not by inadvertence or imprudence
            2. According to the Court Deltour therefore violated his obligation to professional secrecy

5. **Laundering and possession of stolen and fraudulently accessed goods (Article 506-1)**
    a. Persons having held in possession the products of a primary infraction, such as theft or fraud, aware of their criminal origin, will be charged with laundering-possession

i. The Court therefore finds Deltour guilty of the laundering and possession of the product of the domestic theft. As for the laundering and possession of the product of the fraudulent access to a database perpetrated by him, the Court does not retain the charges since this type of laundering was only incriminated by law of 18 July 2014, after the facts had taken place.

ii. Raphaël Halet

2. Domestic theft (Article 464 Criminal Code)

a. In first instance Halet was found guilty of domestic theft for having taken from his employer, without his employer's permission several tax declarations, and for having given access to them to the journalist Perrin for use in his documentary by means of the technique of the dead mailbox
   i. His defense relies on Article 7 ECHR, and the principle of the non-retroactivity of a later jurisprudential turn, namely the fact that only by recent jurisprudence of 2014 it was confirmed that electronic data can fall within the material scope of theft
      1. the jurisprudence of the ECtHR however emphasised that Article 7 does not prevent the application of a "reasonably foreseeable" interpretation that is "coherent with the substance of the infraction"
         a. According to the Court the interpretation that electronic data is a good that can be stolen was perfectly foreseeable given the development and increase in the use of technology and electronic data in daily life, and taking into account the economic value of some of this data. The evolution of jurisprudence was showing a development in that direction already prior to 2014.
         b. The Court also emphasised that Halet was very conscious that his actions were illegal, clearly resulting from his exchanges with Perrin where Halet insisted that he wished to stay anonymous and desired not to lose his job at PwC
            i. Halet knew the documents were property of PwC and that he was not authorised to transmit them to a third person
            ii. The Court therefore concluded that Halet is guilty of domestic theft

3. Informational fraude (Article 509-1 Criminal Code)

a. The defense emphasises that Halet was authorised to access and to maintain himself within the database, reiterating the argument put forward by Deltour's lawyers that the infraction of fraudulent access to a database implies forced entry
   i. As established by the Court in the evaluation of the actions of Deltour, the infraction does not suppose forced entry, and its material element is fulfilled by either the fraudulent access or the continued presence in the database
      1. It is fulfilled when even having legitimate access to the system, non-authorised operations are performed once within the system, the

author of the infraction being aware that he is exceeding his professional functions
    a. The Court hence established that Halet maintained himself fraudulently in the system of his employer PwC in order to download 14 tax declarations, thereby knowingly exceeding the limits of his access authorisation

b. The defense also once again put forward the application of Article 7 ECHR, but the Court re-emphasised that an interpretation of an infraction by the courts which is coherent with the substance of that infraction, such as in the case at hand, should be considered foreseeable.
c. According to the Court the fraudulent intent of Halet was established by his access to the system in order to maintain himself there in order to appropriate documents with the aim of transferring them to the journalist

4. Violation of trade secrets (Article 309-1 Criminal Code)

a. The court in first instance held that by communicating the documents to Perrin, Halet was guilty of knowingly violating his obligation to professional secrecy, with the intention of harming his employer
b. The Public Prosecution on appeal held that the tax declarations appropriated by Halet did not constitute trade secrets, since they do not concern the legal and tax constructions involved in the ATAs. Based on this, the defense asked for the acquittal of Halet on this charge.
c. According to the Court 5 conditions must be fulfilled for an infringement of Article 309-1:
    1. There must be a use or communication
    2. With malicious intent
    3. Or with the aims contained in the law
    4. Of a trade secret
        a. A fact related to a commercial or industrial undertaking known only by a limited number of people of which the revelation would harm the competitive position of the undertaking
    5. By an employee or former employee
        a. This person must have knowledge of this secret following as a consequence of his position in the company
d. According to the Court tax declarations are simple unilateral declarations by an undertaking related to its financial situation and fiscal choices, these do not constitute a trade secret
e. The Court further holds that Halet did not act with the intention to harm his employer but with the aim of supporting the investigation of Perrin into tax evasion and with the aim to inform the public
    i. There was therefore no violation of trade secrets by Halet, he is acquitted of this charge

5. Violation of the obligation to professional secrecy (Article 458 Criminal Code)

a. In first instance it was held that through his profession Halet was subject to the obligation to professional secrecy, that his revelations were made voluntarily, that they were susceptible of causing harm to PwC and were made outside of the situations where the law permits it, and were made with criminal intent

i. The defense submits that Halet was not subject to professional secrecy, since he only worked in the archives and was not an auditor, that he had no higher education and knew nothing of deontology. At the time of the infraction he would not have known that he was subject to professional secrecy.
ii. The Court however emphasised that the obligation to professional secrecy is a public policy provision, and that it applies to all employees of the undertaking, no matter their position or rank: The Law on the Profession of Auditor does not distinguish according to the professional function within an auditing company.
1. The violation of professional secrecy took place at the moment Halet communicated the password of the dead mailbox containing the documents to Perrin, this communication was a voluntary and conscious decision, the charge of violation of professional secrecy can thus be upheld against Halet

6. Laundering and possession of stolen and fraudulently accessed goods (Article 506-
a. Halet is acquitted of the charge of laundering and possession of material obtained through fraudulent access into and the maintaining of oneself in a database, since the law incriminating this as a primary infraction for laundering dates from July 2014, after the occurrence of the incriminating facts. Since Halet was acquitted of the charge of violating trade secrets he is also acquitted of the charge of laundering and possession of material obtained through the violation of trade secrets
b. Since Halet was however held guilty of domestic theft, he is therefore also guilty of the laundering and possession of material obtained through that theft

iii. Edouard Perrin

Perrin was charged as author, or accomplice of Halet, for the violation of trade secrets and professional secrecy, but acquitted in first instance since Perrin acted to protect his source Halet when suggesting the creation of the dead mailbox for the transfer of the documents. He also did not instruct or guide Halet in how to procure the documents, these are therefore not participatory actions to the infraction.

1. The Court of Appeal confirms the acquittal of Perrin on these charges, though on different grounds:
   a. The Public Prosecution considers that Perrin gave Halet useful help in violating his professional secrecy by instructing him on how to use the method of the dead mailbox, and is therefore an accomplice, even if this may be subject to justification under Article 10 ECHR
   b. According to the Court the tax declarations are subject to professional secrecy since they constitute confidential information and are by their nature “secret”. This constitutes the material element of the infraction of violation of professional secrecy. Those who knowingly assist or facilitate the committing of the violation of professional secrecy are considered accomplices, the mere assistance constitutes complicity in the perpetration of the infraction
      i. The facts show that Perrin instructed Halet on how to use the dead mailbox to transfer him the documents in order to protect the anonymity of Halet, which Halet insisted on in his emails to Perrin

ii. The manner in which Perrin was contacted by Halet left no doubt that the documents would not be obtained legally, hence the use of the dead mailbox technique to protect his source
    1. Perrin is therefore an accomplice by providing Halet with useful help to accomplish the violation of professional secrecy
        a. Although the possibility of a justification of responsible journalism exists

Perrin was charged as the accomplice of the infraction of laundering and possession of material obtained from the domestic theft committed by Halet and of the product of the fraudulent access to a database and of the violation of trade secrets by Halet

1. By copying the 14 tax declarations given to him by Halet, Perrin came into possession of the product of the theft perpetrated by Halet, knowing at the time of reception that they were obtained by committing an infraction. He is therefore found guilty of laundering and detention as accomplice of Raphaël Halet.
    a. Although the possibility for justification also exists in this case

5) Legal Justifications

According to the Court 3 justifications could potentially be of application to the facts of the case: (i) the state of necessity, (ii) whistleblower status and (iii) responsible journalism.

i. The state of necessity

Just as in first instance the Court of Appeal held that the state of necessity is not applicable in the case at hand.

- This justification serves to protect those who in the face of imminent, real and grave danger did not see any other alternative to committing an infraction in order to safeguard a higher interest.
    - The lawyers of Deltour asked for the recognition of the state of necessity, claiming that Deltour saw no other option than to violate the right to property and the obligation to professional secrecy given that transparency of the tax system is a higher interest, therefore designating tax optimisation practices as a grave, real and imminent danger
        - The state of necessity according to the Court however applies only to crisis situations. According to the Court Deltour, at the moment of appropriation of the documents, did not yet have the intention to make them public, and only did so after at least 8 months, the danger he felt could therefore not have been imminent
            - At the moment of transfer of documents to the journalist there was therefore no danger or imminence
        - The state of necessity requires a real and imminent danger, it can also be a moral danger, but it goes beyond everyday inconveniences and a feeling of injustice, the event must have put in danger a right or interest that the person in question had the right to protect and prioritise
            - The danger in the case at hand does not fit with the theory of the state of necessity since it concerns non-transparency in fiscal matters, resulting from moral and political concerns
                - Since the condition of an imminent and inevitable danger was not fulfilled, the state of necessity does not apply

ii. Whistleblower status

All defendants have requested their acquittal based on Article 10 ECHR.

- Committee of Ministers of the Council of Europe Recommendations are not binding, the Court therefore preferred to take into account the jurisprudence of the ECtHR when determining the interpretation of Article 10 ECHR and its application to the case at hand
    - There is no definition of a whistleblower, but ECtHR jurisprudence does protect persons denouncing apparent or hidden facts which are of general interest and which are contrary to law, ethics or the public interest. The violation of the obligation to professional secrecy does not stand in the way of this.
        - The illegality of the denounced actions is not a precondition for the application of whistleblower protection, also severe dysfunctions can be denounced
            - 6 conditions alone must be met for the application of whistleblower protection according to the ECtHR (*Guja*-criteria):
                - The communicated information must represent a real public interest
                - The information must be authentic (exact and believable)
                - Communication to the public must be a means of last resort, due to impossibility of acting otherwise
                - The interest in the public receiving this information must outweigh the damage caused to the employer by the revelation
                - The whistleblower must have acted in good faith and be convinced of the authenticity of the information
                - The proportionality of intervention with article 10 ECHR will be evaluated based on the sanction inflicted and on the consequences of the sanctions for the whistleblower

The Court proceeded by evaluating whether these 6 criteria were fulfilled in the case at hand:

- The first three criteria were considered in general terms for all three defendants since these relate to the character of the information that was divulged
    1. Communication in the general interest?
        - ECtHR jurisprudence defines as being in the general interest any important questions originating from political debate in a democratic society that the public has a legitimate interest in being informed about, the practice informed about does not necessarily have to constitute an infraction
            - In the case at hand the revelations concerning tax optimisation structures have led to the European Union making tax evasion and tax transparency an absolute priority, the revelations made way for the public debate in Europe and Luxembourg concerning the imposition of large MNCs
                - The revealed information was therefore of public interest
    2. Authentic and exact information?
        - None of the parties dispute the authenticity and veracity of the documents
    3. Did Deltour and Halet have other means for revealing this information?

        - Communication to the public was the only way, since communicating the information to the authorities or internally in PwC would not have been useful given that these tax practices are legal
- For the next three criteria relating to the person of the whistleblower the Court proceeds by distinguishing between the defendants
    4. Does the interest of the public in receiving the information outweigh the damage caused to the employer by the revelation?
        - Antoine Deltour
            - The public interest in the publication of information concerning the ATAs is in conflict with the interests of PwC and of its clients to not have these known to the public or to their competitors
                a. The Public Prosecution blames Deltour for having revealed all of the documentation he appropriated that was subject to professional secrecy, 20 000 pages, without restricting their use by the journalist, this would be in violation of the principle of proportionality
                    i. Because of this, the revelation is not balanced and highly damages the reputation of PwC, of its clients, and the confidence its clients have in the company
            - However, according to the Court in the jurisprudence of the ECtHR the damage caused is examined *in abstracto*, meaning that the ECtHR will evaluate the damage in general terms and whether it is more than just a hypothetical damage
                a. It is therefore not necessary to examine whether PwC's profits decreased as a result of the leak or any other concrete examination of the kind
                    i. Based on this the Court concludes that a damage was certainly caused to PwC by the violation of professional secrecy, more particularly a moral damage resulting in reputational loss and loss of the trust of its clients, but the general interest in publishing the information is undeniable and largely outweighs the damage caused to PwC and its clients
            - But can Antoine Deltour claim to have acted in the general interest when he transmitted all the downloaded ATAs, 20 000 pages concerning 538 companies?
                a. The Public Prosecution claims it would have been proportionate if Deltour had given a selection of the ATAs to the journalist, had anonymised them before handing them over, or had even given a small number of non-anonymised ATAs, still allowing the practices of tax optimisation to be sufficiently exposed to the public
                b. According to the Court Deltour only learned the meaning of the ATAs after having appropriated them, since the facts indicate that Deltour did not leak the documents himself but instead turned to the expertise of an investigative journalist specialised in tax matters,

knowing that Deltour himself had no professional knowledge in fiscal matters.

i. The journalist contacted Deltour after having read comments he made online showing he had inside knowledge concerning tax optimisation, Perrin wanted tangible proof of the tax practices
    1. Deltour wanted to make it possible for him to select the ATAs that could interest the viewers
    2. Deltour did not know the documents would be transferred to the ICIJ and leaked in their entirety, which is confirmed by the Court
        a. The Court therefore holds that Deltour is not responsible for the worldwide publication of the entirety of the documents appropriated by him
            i. In this case therefore the public interest in knowing outweighs the damage caused to PwC

- Raphaël Halet
    - By transferring 14 tax declarations to Perrin, Halet undeniably caused prejudice to his employer PwC in the form of reputational damage and loss of trust of clients and as victim of domestic theft
        a. The fact that the revelations led to the association of PwC in the minds of the public with tax evasion or tax optimisation, i.e. practices deemed to be unacceptable, means that it necessarily suffered a damage
        b. Halet did not choose the documents to complete the ATAs but made a choice according to the notoriety of the MNC concerned, they were not relevant to the ATAs revealed by Deltour
            i. They were simple tax declarations so they were also not as secret and not as difficult to come by as the ATAs, they revealed nothing new on the practices of the fiscal authorities
            ii. Given Deltour's violation, there was no real imperious reason of general interest in revealing these 14 tax declarations, they added nothing new
                1. Although the documents delivered by Halet supported the documentary of the journalist, they did not contain crucial information that was until then unknown and could not in itself relaunch the debate on tax evasion
                    a. Halet therefore does not fulfill the criterion of proportionality and the damage caused to PwC

outweighs the general interest in his revelations

6. Did the whistleblower act in good faith?
    - Antoine Deltour
        - Although according to the Court there is no doubt that Deltour did not act to harm his employer and did not act out of personal gain, it is not established that Deltour already had the intention of publishing the documents when fraudulently accessing and maintaining himself in PwC's data processing system to procure the documents in October 2010
            a. His lawyers emphasise that the ECtHR jurisprudence does not require that a whistleblower had the intention to blow the whistle at the moment of appropriation of the documents
            b. The Court however stresses that Deltour in his testimony rejects any premeditated strategy or specific goal when downloading the ATAs, he had the intention of using them for personal use in his later career, which he saw in the same sector of audit, since he downloaded training documents along with the ATAs
                i. He admitted that he did not consider himself a whistleblower on the day of the appropriation of the documents and admitted that had he not been contacted by the journalist he would not have attempted to publish the documents
                    1. This is in contradiction with the jurisprudence of the ECtHR in *Guja*, *Heinisch* and *Görmus*, where the professional fault was committed by blowing the whistle. The infraction and the act of whistleblowing are simultaneous, in the case at hand they are separated by time and by motive.
                        a. For the act of domestic theft, and of fraudulent access to a database Deltour can therefore not be protected by the status of whistleblower
                            i. Article 10 ECHR should not be interpreted as a provision which can retroactively justify a prior theft
        - The Court does however find that Deltour acted in good faith in the summer of 2011 when he gave a copy of the documentation to Perrin so that he could make a documentary on the ATAs and the tax practices of large MNCs

a. So the moment when Deltour violates his professional secrecy by transmitting a copy to Perrin he is acting as a whistleblower
    i. Deltour is therefore acquitted of the charge of violation of his obligation to professional secrecy

- Raphaël Halet
    - Since Halet does not satisfy the condition of balancing the interests of the revelation with the interests of the employer that were violated, he cannot benefit from the protection of Article 10
        a. If he acted in good faith however, he can benefit from the recognition of this as an extenuating circumstance, which will impact the sanction he will be given
        b. The Court finds that Halet acted in good faith. He acted out of the wish to see change in the existing tax evasion practices of large MNCs and wished with his contribution to increase tax transparency. The Court will take into account his good faith and the fact that he was dismissed by his employer after it became clear that he had leaked documents when determining the sanction he will incur for the violation of his obligation to professional secrecy.

iii. Responsible Journalism

The ECtHR attributes a very important role in democratic societies to the press and for that reason offers a specific protection to journalists

- Restrictions to freedom of the press are only very rarely admitted in the field of political discourse and matters of public concern due to the general interest in being informed on these matters
- Journalists can benefit from this protection if they act in good faith and conduct responsible journalism, delivering exact and credible information
    - Also investigative journalism can benefit from this protection
    - Illegal conduct of journalists will be taken into account by the ECtHR but does not determine whether or not a journalist acted responsibly within the meaning of Article 10 ECHR. Article 10 ECHR however does not provide an immunity against criminal prosecution for illegal acts committed while exercising journalistic functions.
        - But the ECtHR considers the chilling effect of persecuting journalists for revealing information subject to the obligation to professional secrecy. The freedom of information and freedom of speech are therefore balanced with the right to protection of private and secret information.
            - Public interest can be so great in certain cases that confidentiality may be violated
            - A proportionality test will be made to evaluate the conduct of the journalist
                - The documentary made by Perrin concerned a subject of public interest and was accurate and seriously made,

Perrin respected journalistic deontology rules and acted in good faith, in conformity with the jurisprudence of the ECtHR. Moreover, the publication contributed to a debate on a matter of general interest.

- Perrin is therefore granted the justification of responsible journalist by the Court and is thereby acquitted of the charges of complicity to the violation of the obligation to professional secrecy and of laundering and possession of the product of domestic theft.

4. The Verdict Reached by the Court of Appeal

a. Criminal sanctions

- Antoine Deltour:
  - Guilty of domestic theft and fraudulent access to a database, and of laundering and possession of the product of domestic theft
    - Suspended prison sentence of 6 months and 1500 euros fine
      - Suspended prison sentence due to lack of criminal priors
- Raphaël Halet:
  - Guilty of domestic theft, fraudulent access to a database and laundering and possession of the product of domestic theft, and of violation of the obligation to professional secrecy
    - The justification of whistleblower status does not apply to him, but extenuating circumstances do apply: his honourable motives as well as his lack of criminal priors were taken into account when determining the sanction
      - No prison sentence, 1000 euros fine

b. Civil sanctions

- PwC repeated its request made in first instance to be awarded a symbolic euro as reparation for the damages it suffered.
- The Court of Appeal confirmed that the criminal fault is established, PwC suffered moral damage as a result of the infractions perpetrated by Deltour and Halet.
- The civil fault will be determined by the civil courts, the Court of Appeal underlined that the extent of the damage suffered and the reparation due for that damage will therefore also be left to determine by the civil courts